University of Alberta

The Indian, the Law and the Land: An Analysis of the Chippewas of Sarnia case using P.W. Kahn's Cultural Approach to the Rule of Law

by

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Abstract

This thesis will use P.W. Kahn's cultural approach to law, found in *The Cultural Study of Law: Reconstructing Legal Scholarship*, as a methodology to examine a recent and important Aboriginal land claim decision--the *Chippewas of Sarnia* case. After embarking on an explanation of this methodology to be utilised, I will provide a detailed description of the Ontario Superior Court and Court of Appeal decisions in that case. In a doctrinal exploration of the case I will then allege that both decisions rely heavily on a large scope of judicial discretion.

This exercise of discretion, from a cultural perspective, prompts the question of what factors, beliefs and ideologies contribute to the exercise of discretion in this particular case. In order to do this I will ask the question of what conditions make these particular judgments valuable, practical, and acceptable decisions under the rule of law.

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Chapter 1: Introduction

In Canadian property law legal rules exist to determine who should prevail in the event of competing interests in land. The emergence of Aboriginal land rights in Canada however has created a new, and particularly difficult species of priority dispute, one that is laden not only with doctrinal inconsistency, but the weight of a history marred with colonial notions of superiority and conquest. Through exploring the Ontario Superior Court and the Court of Appeal's decision in the *Chippewas of Sarnia*[1] case, the result of the Chippewas of Sarnia's claim to a quarter of the city of Sarnia, the dynamics created by the complex colonial history of Aboriginal land claims can be seen.

Doctrinally, the *Chippewas* case evidences the confusion created by the sparse and often contradictory precedent that cumulatively composes the legal concept of Aboriginal title. While the general legal description of Aboriginal entitlements as *sui generis* (unique) is consistent throughout the jurisprudence, the legal results that ensue from this legal characterization can hardly be described as such. In fact, the result of designating Aboriginal entitlements as *sui generis* is only seemingly to guarantee a lack of consistency in judicial decision making regarding Aboriginal entitlements by ensuring that there is no principled way to predict which rule will be applied. This phenomenon is a direct result of the description of such entitlements as *sui generis*. Aboriginal entitlements are unique, thus a judicial decision maker may, within the reasonable bounds of precedent, apply any rule he or she finds to be apt. The *Chippewas* case is indeed an example of such determinative freedom within the limits of analogical reasoning.

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[1] *Chippewas of Sarnia Band v. Canada (A.G.)*, (2001) 41 R.P.R. (3d) 1 (Ont. C.A.), [hereinafter *Chippewas* (C.A.)] aff'g on other grounds (1999) 40 R.P.R. (3d) 49 (Ont. Sup. Ct. Just.) [hereinafter *Chippewas* (S.C.J.)], leave to appeal refused [2001] 4 C.N.L.R. iv (S.C.C.), reconsideration denied [2002] 3 C.N.L.R. iv (S.C.C.).

A result of this relative judicial freedom is that the decisions made in these cases can sometimes betray ideological[2] biases. Indeed, I will argue that the *Chippewas* case is an example of this phenomenon. I will contend that ideologically, the *Chippewas* case exhibits the legacy that colonialism has inscribed upon the legal landscape of Aboriginal land claims. The Superior Court and the Court of Appeal decisions are rife with assumptions and images of Aboriginal peoples which are firmly rooted in the law, and the Dominion's colonial past. Through examining the portrayal of the "Indian",[3] and the Indian's relationship with the land, and the Indian's relation to the law in these decisions the ideological undercurrents that make Aboriginal land claims the most difficult species of priority dispute can be examined.

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[2] While the term ideology has had many meanings in relation to different theoretical schools of thought, such as Marxism and cultural studies, the term ideology in this thesis will refer to the most value-neutral definition. This definition, as expressed by Terry Eagleton, is "the general material process of production of ideas, beliefs, and values in social life...Ideology or culture would here denote the whole complex of signifying practices and symbolic processes in a particular society; it would allude to the way individuals 'lived' their social practices, rather to those practices themselves." See T. Eagleton, *Ideology: An Introduction* ((New York: Verso, 1991) at 28; D. Hawkes, *Ideology: the New Critical Idiom*, 2nd ed. (London: Routledge, 2003).

[3] In this thesis I will be employing many of the different names for the Canadian Indigenous population. Each however has its own subtle connotation that I am intentionally emphasizing. The term 'Indian' is intended to evoke the colonial perception of the Indian. The term 'Aboriginal' will be used to refer an ambivalently as possible to the Canadian Aboriginal population. The term 'First Nations' is used to refer to Indigenous social and political groups. The term

The *Chippewas* case is a fairly straightforward example of a priority dispute: an Aboriginal group alleging they were still entitled to a particular tract of land due to a lack of a valid surrender to the Crown and the current fee simple owners. The basic facts of the case were as follows. Pursuant to Treaty 27 ½, which was finalized by Treaty 29, a large surrender of land was effected from the Chippewa Indians. Four areas were reserved from this transfer for the continued use and occupation of the Chippewas of Sarnia. In 1839 one of these reserved areas was allegedly surrendered as a result of an agreement made between a land speculator and businessman Malcolm Cameron and three Chippewa Chiefs. Fourteen years later, in 1853, letters patent were then granted to Malcolm Cameron by the Colonial government.

In the late 1970's a researcher looking into the history of a dispute over road allowances on behalf of the Chippewas of Sarnia band discovered that there seemed to be no record of the surrender of the 2540 acres of land comprising one of the four reserved areas. Upon further investigation the circumstances under which the land had been alienated were discovered. While there was a record of an alleged surrender, few, if any, of the proper surrender requirements had been followed. In 1995, the Chippewas of Sarnia commenced an action to reclaim this

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'Indigenous' is intended to emphasize the pre-existing nature of Canadian Aboriginals.

four square mile area of land that they alleged had been improperly surrendered.[4] The Chippewas of Sarnia thus launched a class action proceeding against all of the current possessors of land subject to the Cameron patent, seeking a declaration of Aboriginal title in these lands that now comprise nearly a quarter of the modern city of Sarnia[5]--lands now covered with 2000 residences, five schools, five churches, as well as industrial and commercial properties. They also sought writs of possession against Canadian National Railway Company, Dow Chemical Canada Incorporated, and Imperial Oil Limited.

The Ontario Superior Court decision and the Court of Appeal decision explored in this thesis, however, are not the product of the initial action. These decisions are a product of a motion of summary by the Crown and the landowners to dismiss the claim for possession and trespass. The Chippewas made a cross-motion for summary judgment declaring the Cameron patent was void *ab initio.* The issue of damages for breach of fiduciary duty against the Crown was, as a result, not a part of the motion.

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[4] The Superior Court judgment in the *Chippewas* case is the result of two motions for summary judgment of an underlying claim on the part of the Chippewas for a writ of possession over the contested land, damages for trespass, and damages for breach of fiduciary duty against the Crown. The Attorney General for Canada made a motion to dismiss the claim for possession and trespass on the grounds that there was no serious issue to be tried. The Chippewas cross-appealed for summary judgment alleging that the Cameron patent was void thus entitling them to a declaration of possession. As a result the issue of damages for breach of fiduciary duty were not a part of the judgment.

[5] *Chippewas of Sarnia Band v. Canada (A.G.)* (1996) 137 D.L.R. (4th) 135 (Ont. Sup. Ct. Just. (Gen. Div.)

The first issue the courts had to determine in the motions put before them was if the Chippewas' Aboriginal interest in the land had been extinguished through surrender to the Crown, or any other valid means. Answering this question however required the Court to determine several legal questions. The first issue concerned the surrender requirements of a valid surrender of land to the Crown in 1839. There was also the related legal issue of whether the Chippewas' Aboriginal title has been extinguished through any other means, such as the granting of the patent to Malcolm Cameron.

The second issue that the courts had to determine was, if the Chippewas' Aboriginal title had not been surrendered, whether the remedy of possession that the Chippewas were seeking in the action should be awarded. Deliberation on this legal issue involved deciding whether the Chippewas were entitled to the remedy of a declaration that the 1853 patent was void, thus entitling the Chippewas to possession of the land. This involved the question of whether the Chippewas' claim to the land itself was barred by any statutory or equitable limitation periods.

In Justice Archie Campbell's judgement, on the issue of extinguishment, the Superior Court held that the Chippewas had not surrendered their interest in the land. A valid formal surrender required that the land be bought by the Crown for the Crown. Surrender also had to occur at a public meeting held for the express purpose of surrendering the land by the Governor or Commander in

Chief.[6] The record, he determined, did not demonstrate that these procedures had been adhered to. Nor was he of the opinion that any statutory act, of either the Dominion of Canada or the province of Ontario, had extinguished their title. Following the *nemo dat quod non habet rule* (no one can give what he or she does not have)[7] he found the Cameron patent void *ab initio.* On the issue of remedy, however, Justice Campbell, as commentator Kent McNeil writes, was "unwilling to correct the wrong by returning the land to the Chippewas, because this would have meant dispossessing the innocent persons who traced their titles back to the patent."[8] In consequence, he held that the equitable rule of *bona fide* purchaser for value mandated the imposition of a 60 year equitable limitation period.

The Court of Appeal arrived at a similar result, however they use quite a different analysis. On the issue of extinguishment, the court determines that the Chippewas' interest in the land had neither been surrendered, nor extinguished by any statutory act. There are however differences between the Court of Appeal and the Superior Court analysis of the facts surrounding the surrender, and the following events. While the Superior Court had found that the Chippewas had neither surrendered the land nor consented to the transfer, this Court does not find that the Cameron patent was void *ab initio.* Instead, the Court finds the distinction between void and voidable transactions is a rather irrelevant fiction. They alleged that the real issue is whether or not the judge deciding the case is willing to grant the remedy of declaration of possession or not. Another difference between the two judgements is the Court of Appeal's decision that, on the facts, either before or after the granting of the patent, the Chippewas had "acknowledged and accepted"[9] the transfer of the land "in the twenty years following the transaction."[10] This finding may have had no relevance to the analysis of whether the Chippewas' title had been extinguished through surrender, it does nonetheless contribute to the Court of Appeal application of the equitable defence of laches and acquiescence as a bar to the claim, in addition to the defence of *bona fide* purchaser.

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[6] *Chippewas* (S.C.J.), *supra* note 1 at para. 334.

[7] See B. Ziff, *Principles of Property Law*, 3rd ed. (Scarborough: Carswell, 2000) at 412-414.

[8] K. McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2002) 33 Ottawa L. Rev. 301 at 329.

While the analysis in the *Chippewas* case, at both court levels, has met with criticism from both practitioners and academics, this case has been discussed mainly as a result of its practical and doctrinal effects. Kathleen Waters, for example, has expressed displeasure with the Court of Appeal decision for not establishing a certain rule, such that real estate practitioners in Ontario could predict with reasonable accuracy the certainty of title to land potentially subject to Aboriginal claims.[11] Waters instead preferred the Superior Court's approach of imposing a 60-year equitable limitation period for at least it would have provided more of "a guarantee to landowners that the patentee and his or her successors in title will win."[12] Legal scholar Kent McNeil has criticised both the Superior Court and the Court of Appeal for deviating from established legal doctrine when faced with deciding between honouring Aboriginal title or safeguarding the interests of current occupiers. His main complaint is that both courts seem willing to "disregard or change well-established legal rules in order to deny Aboriginal claims."[13]

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[9] *Chippewas* (C.A.), *supra* note 1 at para. 184.

[10] *Ibid.*

[11] See K. Waters, "A Primer of Aboriginal Title: Understanding

While this thesis will review doctrinal criticisms of the *Chippewas* case offered by Kent McNeil, this project will go further. What the doctrinal analysis demonstrates, as Kent McNeil so aptly notes, is that legal rules have been shrugged aside in favour of judicial discretion, which can be used in order to deny Aboriginal claims. The question that is yet to be fully explored is this: what about this case, and Aboriginal claims to land in general, precipitates both courts in the *Chippewas* case unwillingness to allow the Aboriginal claimants to succeed. In order to begin to answer this question however, I believe it is necessary to look at the law differently.

In order to do this I will rely on Paul W. Kahn's cultural theory of law as a paradigm for analysing the *Chippewas* case. In Kahn's book, *The Cultural Study*

Chippewas of Sarnia" (2001) 41 R.P.R. (3d) 94.

[12] *Ibid* at 95-96.

[13] McNeil, *supra* note 8 at 344.

of Law: Reconstructing Legal Scholarship,[14] he argues that legal scholars must move away from prescriptive and normative analysis. This requires that legal scholars abandon what Rubin describes as a "prescriptive discourse, that is, one that addresses recommendations to identifiable social decision makers"[15] based upon "normative premises–policy or value judgments that serve as a starting point for analysis."[16] Instead Kahn argues that we begin from a different supposition. The supposition is that

> ...we accept the proposition that there is nothing natural about the legal order, that it is a constructed social world that could be constructed differently. Nevertheless, we must put off the impulse to re-create the world on our own blueprint. We must first bring the legal world to light by raising self-conscious examination of the social and psychological meanings of a world understood as the rule of law... We need a form of scholarship that gives up the project of legal reform, not because it is satisfied with things the way they are, but because it wants to better understand who and what we are.[17]

The inquiry thus ceases to "measure beliefs against a separate truth. Rather we ask how truth is constituted through beliefs."[18] In result, we will thus be able to understand better the ideological reasons for particular judicial reactions to Aboriginal land claims.

While it is at this point that I should state what the inquiry becomes as a result of Kahn's paradigm shift away from normative scholarship, it is first necessary to explain Kahn's methodology stated above, as well as the underlying assumptions and world-view from which this approach radiates.. The first necessary pre-condition for this analytical paradigm is the redefinition of the subject of inquiry. It is necessary, in order to ask questions that "bring the legal world to light,"[19] to shift the subject to exactly that–the legal world. This reorientation can be illustrated through an example drawn from commentary on the *Chippewas* case provided by Kent McNeil.[20] In his commentary on the *Chippewas* case, he criticises the Superior Court and the Court of Appeal for changing long-standing legal rules in order to defeat the Chippewas' claim. If we do not reorient the subject, the question is simply why the courts, or those particular judges in that particular case, were unwilling to return the land to the Chippewas. This line of questioning either leads us back to the judgements to find the explanation offered, or to the personal motives or propensities of the particular judges. We can however formulate the question differently, so as to leave, as described by theorist Michel Foucault, the "epistemological level of knowledge"[21] and enter into an investigation of the "archaeological level of

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[14] (Chicago: Chicago U.P., 1999).

[15] E.L. Rubin, "The Evaluation of Prescriptive Scholarship" (1990) 10 Tel Aviv U. Studies in Law 101 at 101.

[16] *Ibid* .

[17] Kahn, *supra* note 14 at 30.

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[18] *Ibid* at 35-6.

[19] *Ibid* at 30.

[20] See, *Supra* note 8.

[21] M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Routledge, 1966) at xiv.

knowledge".[22] This necessitates focussing on legal discourse

> not from the point of view of the individuals who are speaking, nor from the point of view of the formal structures of what they are saying, but from the point of view of the rules that come into play in the very existence of such discourse: [For example] [w]hat conditions did Linnaeus (or Petty, or Arnaud) have to fulfill not to make his discourse coherent and true in general, but to give it, at the time when it was written and accepted, value and practical application as scientific discourse–or, more exactly, as naturalist, economic, or grammatical discourse.[23]

Returning to the example above, the question becomes not what legal logic the courts employed, rightly or wrongly, to deny the Chippewas' claim, but rather, what are the conditions the courts were trying to fulfill in their judgements that make it an acceptable, practical and valuable legal decision within the current social and ideological conditions.

This approach to legal discourse is developed in *The Cultural Study of Law*,[24] through Kahn's justification of both why this methodology is necessary in legal scholarship, and his elaboration of how this line of inquiry should be conducted. Initially Kahn argues for the need to separate the practice of law from the study of law. He argues that the collapse of these two endeavours does not allow for an "imaginative act of separation...creating a distance between the subject and his or her beliefs".[25] This lack of separation, Kahn argues, has relegated legal scholarship to the limited project of legal reform. As Kahn describes,

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[22] Foucault, *Ibid* at xiv.

[23] *Ibid.*

[24] Kahn, *supra* note 14.

> The law review article characteristically begins by identifying an alleged error in a recent appellate court opinion. The outcome should have been different according to the scholar. The argument that follows consists largely of a review of prior Supreme Court opinions to find the principle of reason that informs the decisions...The scholar claims to stand in the same position as the Court in interpreting the body of precedent.[26]

As a result "the scholar's position is like that of the dissenting voice within the Court: a momentary voice of disagreement that usually...returns to the institution."[27]

Kahn thus proposes eight methodological rules in order to guide this form of inquiry that separates the practice of law from the study of law. These rules are that 1) "the rule of law is not a failed form of itself"[28], 2) "the rule of law is not the product of rational design"[29], 3) "the rule of law is a set of meanings by which we live"[30], 4) "scholarship must forsake the myth of progress"[31], 5) "the object of cultural study is the community, not the individual"[32], 6) "law's rule is

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[25] *Ibid* at 3.

[26] *Ibid* at 28.

[27] *Ibid.*

[28] *Ibid* at 92.

[29] *Ibid* at 97.

[30] *Ibid* at 102.

[31] *Ibid* at 106.

[32] *Ibid* at 112.

never at stake in a particular case"[33], 7) "the cultural study of law requires the study of law's other"[34], and 8) "the rule of law makes a total claim upon the self"[35].

The rule that "law is not a failed form of itself"[36] underscores the idea that scholars must not look at the law as "the product of someone's or some community's effort to be something which has been only partially achieved."[37] If we accept this predicate, we can begin focussing on what law is, not how it fails to meet our particular choice of normative end. We can then begin to see how "[l]aw's rule is present in the way we perceive events in space and time, think of ourselves as subjects who are members of a particular community, and understand the legitimate demands of authority."[38] By way of illustration, in relation to Aboriginal title claims, this rule encourages the legal scholar to set aside the urge to reform the law because it isn't fulfilling its role in either promoting Aboriginal justice or securing current owners title. Instead, we must "bring to self consciousness those background structures of meaning that are already in place and which make possible the particular regulatory schemes over which we argue."[39] This changes the mandate of a scholar in Aboriginal law to the task of better understanding the historical, political, legal and structural landscape that influence decisions such as the *Chippewas* case.

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[33] *Ibid* at 117.

[34] *Ibid* at 119.

[35] *Ibid* at 123.

[36] *Supra* note 28.

[37] *Ibid.*

[38] *Ibid.*

Not only must the legal academic give up the project of reform, but they must also give up any belief in legal destiny. The rule that "scholarship must forsake the myth of progress",[40] demands that "the cultural scholar must not bring a myth of progress to the study of law. The history of the rule of law is not the progressive realization of any norm or set of norms."[41] He illustrates this point by using a reference to property law. He points out that "[t]he rule of law supports multiple narrations of progress, as well as decline of which none is the "true" account. Has a property regime, for example, led us to a grossly unjust distribution or to a remarkably efficient use of resources?"[42] The question to this answer is wholly dependent on what normative end the law should be promoting. This myth of progress is apparent in the example of international law, which is descriptive of the colonization of what would later become Canada.. As Kahn writes:

> Some of the most extreme examples of the myth of progress are found in international law scholarship. Not long ago, international law explicitly invoked the categories of "civilized versus "uncivilized" nations...Civilized were those to which one could look in articulating the

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[39] *Ibid.*

[40] *Supra* note 31.

[41] *Ibid* at 106.

[42] *Ibid* at 107.

> rule of law. Through the idea of customary international law, the behavioural norms of a few western states were identified with true, legal practice. The uncivilized states were those that did not yet accept law's rule, meaning they did not follow the same practices as the civilized. There was only one attitude toward the uncivilized: they were to be brought into the category of the civilized. The story of international law was, accordingly, one of progressive civilizing of states.[43]

Thus, this rule reminds scholars not to accept as natural the idea that the current legal order is the result of a culmination of past legal decisions that have led us to the pinnacle of legal rule we are currently experiencing, and will lead us in the future to even greater heights of juristic enlightenment. If we do, especially in the area of Aboriginal law, there is an implicit agreement that the legal actions taken with regard to First Nations in Canadian history were not only acceptable but inevitable to achieve our current enlightened order. Implicit assumptions such as this inhibit the ability to explore "the manner in which both sides [in a legal action] lay claim to the value of progress under law's rule."[44]

The task described by Kahn's first rule is expanded by the recognition of the complexity of the cultural form we call law. Aboriginal law, for example, is punctuated by inherited historical inconsistencies, and doctrinal incoherence resulting from the many different normative goals that law serves, such as efficiency, justice, and certainty. Thus, Kahn reminds us that "[t]he rule of law is not the product of rational design, whether conscious or unconscious. It was not constructed according to a systematic plan and it exhibits no single rational order." [45] This rule highlights that the system of law can not be expected to be consistent, logical, orderly, or homogeneous. Law is not a product of a homogeneous society, thus it cannot itself be expected to be homogeneous. As Kahn writes, "we should not expect all of the elements of a cultural form to fall into systematic order in which they are rationally related to one and another. Instead, we should expect to find a multiplicity of overlapping structures of meaning."[46]

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[43] *Ibid* at 109.

[44] *Ibid* at 108.

Accepting that law is not a rationally ordered system may seem to make the need to reform an even more urgent project for academics. If it is not logical and orderly, must it not be fixed in order to maintain its legitimacy? Kahn's third rule however, urges the mitigation of this desire by assuring us of how law's power permeates our lives. He thus proposes that we "recogniz[e] that the rule of law is a set of meanings by which we live–and that is all it is."[47] This however is no small thing. Regardless of the debates over the necessary reforms, law continues to shape the conditions by which we live. This rule thus reminds us that an important line of inquiry "is not reform of law ('what should the law be?') but the manner in which reform is conceived and practised."[48] In addition, law is a self-perpetuating system of conditions by which we live. No legal decision "can shake our belief in law's rule."[49]

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[45] *Ibid* at 98.

[46] *Ibid* at 98.

[47] *Ibid* at 102.

[48] *Ibid* at 104.

This inevitable constancy of belief in the law is expressed in Kahn's methodological principle that "[l]aw's rule is never at stake in the outcome of a particular case."[50] This rule underscores the idea that not only does law form the set of conditions under which we live, but also reminds us of the unshakable nature of law's rule, regardless of all of the "dramatic rhetoric"[51] heard in the courtroom that "the law 'requires' the outcome"[52] for which the particular advocate is arguing. Law's decisions, no matter what they are, are always correct.

Not only is law always contemporaneously correct, regardless of the outcome, it permeates our entire existence. Law in liberal societies forms the rules by which we live. As such, Kahn proposes that "[t]he rule of law makes a total claim upon the self."[53] As Kahn writes:

> We experience the rule of law not just when the policeman stops us on the street or when we consult a lawyer on how to create a corporation. The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent.[54]

If law's influence is so complete, how does one thus begin to define the object which must become the study of law? Kahn's fifth methodological rule mandating that "the object of cultural study is the community in its appearance as a single, historical subject."[55] The breadth of the community Kahn is referring to needs some further elaboration, as it is larger than the usual connotation of the term. Kahn is referring to the greater political community described by the "we" that is created and maintained under the rule of law. As Kahn explains, "the judicial 'we' refers to a single transgenerational, communal self. To speak as 'we' is to assert an identity that simultaneously takes responsibility for the past and derives authority from it. Each Justice is part of this communal subject. So too is each citizen a part of the larger 'we' that is the state under the rule of law."[56]

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[49] *Ibid* at 119.

[50] *Ibid* at 117.

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid* at 123.

[54] *Ibid* at 124.

While it is necessary to study the constitution of the collective in a cultural study of law, it is also important to examine that which constitutes the law's other. As such, Kahn states that "to understand the rule of law we must examine that which we imagine to be other than law."[57] The examples that Kahn provides for law's others are love and political action.[58] When looking at the current construction of Aboriginal title, it becomes a possibility that some aspects of Aboriginal title lie outside the realm of law, and thus need to either be domesticated, as it were, through making ill-fitting legal and rational analogies, or be suppressed entirely. A broad illustration of this struggle is the difficulty the common law courts have had in understanding, describing, and implementing Aboriginal ideas of land ownership. The result of over 100 years of judicial deliberation has been a sparse and often inconsistent jurisprudence, in which the only conceptual consistency is the agreement that Aboriginal entitlements are unique. Aboriginal culture is indeed characterised as so foreign, that all that is certain is that it is unique.

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[55] *Ibid* at 112.

[56] *Ibid* at 113.

[57] *Ibid* at 120.

[58] *Ibid* at 120.

If the preceding discussion explores the question of *how* to approach the study of law, it becomes necessary to define *what* it is that we study. To what 'texts' can we apply these methodologies? As Kahn writes, the task of studying the culture of law

> is a large task, but it is not formless. It is made somewhat easier by the fact that our culture of law's rule is substantially a culture of texts. The transition from revolution to law appears to us as the production of a text; subsequent productions of law appear as commentary. The judicial opinion has a special, but not exclusive, role in the study of law's rule. Judicial opinions are efforts of self-justifications under law. They are designed to make us see an event as an instance of law's rule. Each struggles to create an appearance of law by suppressing alternative ways of understanding the event.[59]

We can therefore look at the judicial decision as "a fair reflection of our values and beliefs, with all the tensions that we experience among the norms."[60] Using the judicial decision as the subject of cultural inquiry however necessitates that the distinction between *ratio* and *dicta* must be set aside. The whole of the judgment is relevant not only for what it accepts as 'law', but for what it rejects. In addition the judicial decision must be contextualised. The 'text' of the judicial event is not disembodied from the surroundings of its production, despite what the culture of law would have us imagine. Thus, in this thesis I will use the decisions in the *Chippewas* case as texts that can be used to explore the "world of legal meaning"[61] or how Aboriginal land claims are conceived within the social order.

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[59] *Ibid* at 125.

[60] *Ibid* at 136.

There are two facets of cultural analysis that will be found in this thesis–a genealogical and an architectural approach. Both of these approaches are necessary, according to Kahn, to understand the "multiplicity of overlapping structures of meaning"[62] found within the law. Through deploying both a genealogical and architectural analysis, the origins, historical contours, and the current manifestations of the sometimes dissonant legal structures can be examined. As Kahn describes:

> The ambition of legal genealogy is to show how the nature of belief in the rule of law emerges from longer traditions within Western culture and particularly within the experience of the state. Modern understandings of the rule of law are the product of two fundamental cultural transitions: from a religious to a secular understanding of political order, and from a monarchical to a popular understanding of sovereignty. All of the conceptions that we use to understand the general character of political order pass through this double transition. This transition, however, is not a complete transformation; it is a process of adaptation. The concepts continue to bear meanings derived from their past; they carry 'remnants' of this past. Legal genealogy seeks to excavate these remnants. To do that, we need to trace the contingent, historical course by which these

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[61] *Ibid* at 91.

[62] *Ibid* at 98.

beliefs became ours.[63]

As a part of this exploration, I will be reviewing the construction of the historical Indian to develop this genealogy. In this way the limitations of the law to affect reconciliation between First Nations and the rest of Canadian society can be understood as a result of the limited "range of possibilities available to the legal decision maker at any moment."[64]

The architectural approach aims to understand how these concepts inherited from our forefathers currently interact with each other. For example, how does our inherited paternalism towards Aboriginal peoples affect the resolution of Aboriginal land claims within the modern court system? This architectural exercise affords

> ...the recognition that historically determined paradigms survive not simply as remnants, but as positions that remain attractive to individuals and groups. Originalism may be displaced as the dominant paradigm, but it remains a resource for argument within the legal practice. Architecture investigates how the variety of approaches continue to relate to each other.[65]

In the *Chippewas* case, the courts hearing the matter are forced to make some fundamental decisions about the allocation of one of the most limited resources–land. In order to make these decisions the property law system, and the judges that preside over it, must make "controversial value judgments about how to choose between conflicting interests...Dealing with these conflicts brings questions of political and moral judgement inside the property system itself."[66] .

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[63] *Ibid* at 41.

[64] *Ibid* at 114.

As Laura Underkuffler-Freund writes:

> Property rights are, by nature, social rights; they embody how we as a society, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others. Try as we might to separate this right from choice, conflict, and vexing social questions, it cannot be done. To say that what should be done cannot be considered, is to say that what we have done and will do must be unthinking, ignorant, and blind. Why do we reward this claim, and not that one? What is our purpose in protecting the acquisitive activities of one person and denying protection for those of another? To deny the relevance of such questions to the interpretation of a right is to treat the most contextualized right without mention of context, the most conflicted right without the mention of conflict. [67]

The purpose of this exploration is to use a cultural study of the *Chippewas* case to determine what some of the considerations are in Aboriginal land claims cases when a court must choose between pre-existing Aboriginal title and current occupiers and possessors. As Singer writes "What we need is a way to address value choices directly and honestly."[68]

Kahn's cultural theory of law gives us just that, a way to approach, examine, and analyse the law, not to argue necessarily that the choices that have been made are wrong, but to better understand how these choices are being made, and what epistemological framework supports them. The dominant contribution

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[65] *Ibid* at 89.

[66] J.W. Singer, *Entitlements: The Paradoxes of Property* (New Haven: Yale UP, 2000) at 7.

[67] L.S. Underkuffler-Freund, "Property: A Special Right" (1996) 71 Notre Dame Law Review 1033 at 1046.

of this approach to legal scholarship, which borrows from a variety of loosely related theoretical developments in the social sciences and the humanities such as cultural anthropology, postmodernism, and post-structuralism,[69] is to re-orient how we ask questions about legal rules and results. Rather than ending the inquiry into a legal problem or situation with the doctrinal legal reasoning, we can inquire further into the "reasons connected with our relations to the [greater cultural,] social, [historical, and ideological] order which make us want to"[70] come to the legal decisions we do.[71] Through using this approach advocated by Kahn, the prevailing legal system's response to Aboriginal land claims can be analysed in order to unearth the values and ideologies that it serves to further. In other words we can ask the following question using the *Chippewas* case as our primary text, or example: what are the "reasons connected to our social order" that precipitated, or factored into the legal result in the *Chippewas* case?

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[68] Singer, *supra* note 66 at 12.

[69] Kahn specifically mentions the importance of anthropological theory and cultural theory in his theoretical paradigm, as represented by cultural anthropologist Clifford Geertz, and post-structuralist Michel Foucault. See Kahn, *supra* note 14 at 35 .

[70] Eagleton, *supra* note 2 at 19.

[71] See D. Litowotz, *Postmodern Philosophy and Law* (Lawrence: Kansas UP, 1997); and F. DeCoste, *On Coming to Law: Law in Liberal Societies* (Markham: Butterworths, 2001) for insight into the resistance of traditional liberal legal scholarship to approaches, such as this one, which are described as external perspectives.

This inquiry begins with a detailed or "thick description"[72]of the judgements in the *Chippewas* case. Thus, in chapter two an intensive description of the Superior Court judgement will be undertaken to explore the Court's analysis of the factual and legal issues. The goal of this process is not only to discover the *ratio* of the decision, but also to understand how the Court constructed the narrative of the events involved. Chapter 3 contains the same process, examining the Court of Appeal decision. This will provide the background for first, a doctrinal analysis, and second an architectural and genealogical exploration.

The doctrinal analysis found in chapter 4 will first review the concept of Aboriginal title in Canadian law and the generally accepted mechanisms through which it can be extinguished. A review of the decisions rendered at the Superior Court, and the Court of Appeal will then be undertaken. This analysis will demonstrate that the results in the *Chippewas* case, at both levels of court, were far from the only legal options available to the court. Indeed, this chapter demonstrates that the decisions at both court levels show a remarkable amount of judicial creativity, justified by the insistence of both courts that they indeed had broad discretionary powers.

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[72] 'Thick description' is an approach designed by anthropologist Clifford Geertz to explore the symbolic and epistemological aspects of culture. As Julia Garrett describes, "[t]hick description often begins with what might be called 'thin' description, the detailed but essentially superficial presentation of a specific cultural artefact: perhaps an anecdote, a custom, an incident, an institution, or a historical episode. This description is 'thickened' when it gives way to analysis and interpretation, when the cultural artefact becomes a text to be read." See, I.R. Makaryk, ed. *Encyclopedia of Contemporary Literary Theory: Approaches, Scholars, Terms* (Toronto: University of Toronto Press, 1997) at 331.

This use of broad discretion prompts an interesting question: what factors, from a cultural approach to law contribute to the exercise of discretion in the *Chippewas* case? More specifically, what may have contributed to this hesitancy to reward the Chippewas' claim to possession of the land? As such, the underlying assumptions and beliefs of the court in relation to Aboriginal peoples, their relationship to the land, and their relationship to the law becomes an important part of understanding the decisions in this case. As a result, chapter five will first explore the Superior Court and the Court of Appeal's construction of the "Indian" to examine if there is something about the Indian, connected to the social order that contributes to the judicial hesitancy in the *Chippewas* case to award them possession of the land. This genealogical and archaeological exploration will begin with a brief description of Aboriginal peoples in Canadian history so as to "investigate the shape of legal space and time generally."[73] The purpose of this exploration, though admittedly cursory, is simply to excavate some of the dominant perceptions of Indigenous peoples in political and legal history so as to be aware of these tendencies when exploring the *Chippewas* case. The Superior Court, and the Court of Appeal's perception of the Indian will then be examined, with the aim of determining if the two courts share a perception of the Chippewas that gives rise to the hesitancy of the courts to award them the land. This exploration will demonstrate that this does not seem to be the case, as the two levels of court have different perceptions and interpretations of the Chippewas, and seemingly Aboriginal peoples in general. At the Superior Court the Indian is seen as part of a historical narrative of victimization at the hands of the Dominion's colonial aspirations either intentionally or negligently. Compare this with the Court of Appeal's experience of the history of the Indian, in which the intention and negligence is attributed to the Chippewas band itself.

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[73] Kahn, *supra* note 14 at 37.

In chapter five we will find that it seems not to be something about the Indian that inspires a reluctance to reward the Chippewas' possession of the land. Chapter six will thus test the thesis that there is something about land, connected to our social order, that fosters a judicial unwillingness to award the Chippewas the remedy of possession. This chapter will thus explore the Superior Court and the Court of Appeal's discussion of the land, in order to determine if this hesitancy is indeed connected to the importance of property. It will be seen that in both court decisions the land, or more specifically the unwillingness to deprive the current owners of the land, has two important aspects. Not only is there the obvious financial or commercial aspect of the property that contributes to the result in both decisions, but there is also a prevalent moral aspect.

While in chapter six the unwillingness to deprive current possessors of their land was found to contribute to the results in the *Chippewas* case, this does not fully explain the anxiety experienced as a result of Aboriginal land claims. If it did, then all property rules that had the same effect would cause the same amount of anxiety. Indeed while an individual dispossessed by the *nemo dat* rule, for example, would likely experience some discomfort surrounding their legal situation; there is not nearly the same fervour in regard to this rule as in the case of Aboriginal land claims. Accordingly, chapter 7 will explore whether there is something about the law of Aboriginal title that also creates some hesitancy to award the Chippewas the land. This exploration will demonstrate that the *sui generis* nature of Aboriginal title indeed contributes to an anxiety about Aboriginal land claims and land holding through its judicial underdevelopment, its indeterminacy and its construction as alterior to the dominant landholding system. I will then conclude with the lessons that can be learned from exploring the *Chippewas* case using Kahn's cultural approach to law.

While it is impossible to pinpoint the exact impact of underlying ideologies on Aboriginal land claims, in light of the stated desire to affect reconciliation, it is important to recognize that they do have an impact. This realization may not afford the solution to the issue of conflicting claims between Aboriginal peoples in Canada and the rest of Canadian society; but it may allow for the open and honest examination of how Canada's colonial past may still be affecting the present approaches towards Aboriginal peoples, and ultimately the future success of the project of reconciliation. Indeed, Kahn's contingent model of the rule of law may provide even greater hope for the possibility of successful reconciliation of Aboriginal peoples with Canadian society, for in this model there is the potential to create solutions that extend beyond the circumscribed borders of a traditional conception of the rule of law. In this model law can be seen as fiction, a product of society's collective imagination. It is possible then, that society could imagine a legal world where resolving historical claims to land does not involve the repetition of colonial paternalism, but fosters Indigenous landholding paradigms without compromising the dominant landholding system. This truly is the power of fictions–infinite possibilities.

Chapter 2: The Superior Court Judgment

I. Introduction

As the introduction suggested a project such as this must begin with a detailed description of the legal event. This project will therefore start with a thorough exploration of the judicial decisions in the case, so as to provide a basis for further analysis. This chapter will thus explore the Superior Court decision in the *Chippewas* case as an exercise in judicial "self-justification under the law."[74] As Kahn writes, the judicial decision plays an important role in the rule of law, as "[e]ach is designed to make use see an event as an instance of law's rule. Each struggles to create an appearance of law by suppressing alternative ways to understand the event."[75] This chapter will thus describe and interpret how the Superior Court imagines the events that led up to, and followed the land transaction in question.

II. The facts

On October 18th, 1995 the Chippewas of Sarnia band commenced an action for the return of 2000 acres of land which forms a significant area of the modern city of Sarnia. The Chippewas were making a claim for the return of the land, alleging that they had never surrendered it, thus retained common law rights in the land. They sought a declaration to this effect, as well as damages for trespass, and damages for breach of fiduciary duty. In response, the Crown and the current owners of the land moved for summary judgment dismissing the Chippewas' claim on the grounds that the 1853 patent, upon which their title was based, was valid and as a result, it was alleged that there was no serious issue to be tried. The Chippewas cross appealed seeking the opposite–a declaration that the patent was void *ab initio*, and the Chippewas were thus entitled to succeed. The lengthy Superior Court decision in the *Chippewas* case, written by Justice Archie Campbell, is the product of these motions.

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[74] Kahn, *supra* note 14 at 125.

[75] *Ibid*

While this case could be characterized as a rather strait forward priority dispute between the Chippewas band and the current owners, the complexity of both factual and legal issues resulting from the difficult nature of Aboriginal land claims makes it far from that. The facts of the case had to be reconstructed from a voluminous, but indeterminate and one-sided trail of documents from the middle of the 19th Century.[76] As a result the case becomes a historical exploration that attempts to reconstruct the events, intentions, and actions that culminated in, and followed, the alleged surrender of the land in question. The legal issues, in addition to being obscured by the forgetfulness of documented history are also complex, as they too are dependent on the interpretation of statutory instruments from the antiquated past.

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[76] The record consisted of a massive amount of evidence. All of this evidence was documentary evidence, and as such the role of the court was supposedly not to make findings of fact, but simply interpret the law. As Justice Archie Campbell writes: "[w]hen testing the evidence against these legal principles it must be remembered at every step that this is not a trial but a series of motions for summary judgment. It is not the function of the court to evaluate credibility, weigh evidence, or draw factual inferences. These are all functions reserved for trial proceedings. The limited function of the court on these motions is simply to determine whether or not there is a genuine issue for trial. This historical record, based on documents that are not in dispute, does not raise any genuine issues of fact which require a trial for their resolution." See *Chippewas*

The tract of land in contention in the case was initially an exempted reserve in an earlier land surrender by the Chippewas to the Crown. This initial negotiation took place between 1818 and 1827, and culminated in a treaty transferring title to the Crown of "two million two hundred thousand acres in a tract of land beginning on the midpoint of the St. Clair River running northeast to a point on what is now Highway 401 east of Woodstock, then north to present-day highway 9 near Arthur and then west through Wingham to lake Huron."[77] The negotiation leading to the surrender of this land, as described by the Superior Court, was marked by the following concerns:

> The first is the concern of the Indians, from the beginning, that their reserves should be large enough to sustain their traditional way of life. The second is the recognition that councils for the alienation of land could not be held during hunting season when there were insufficient members of the community present to conduct land transactions, and care taken on both sides to ensure that land business was not transacted until all necessary parties were present from the Indian side. The third is the extensive negotiations during the nine years leading up to the final treaty of surrender.[78]

After the many years of negotiation the resulting treaty, Treaty 29, was a fairly comprehensive document witnessed by 18 chiefs and principal men. It formally surrendered their interest in the land described in the document by a surveying description.

(S.C.J.) *supra* note 1 at para 10.

[77] *Ibid* at para 16.

While this earlier surrender figures little into the direct facts relevant to the transaction questioned in this action, it contributes to Justice Campbell's characterisation of the Cameron transaction. Its characteristics therefore deserve consideration in order to understand some of the legal findings at the Superior Court. Indeed, Justice Campbell offers the following instruction regarding the earlier surrender of land:

> The reader is invited, when considering the Cameron transaction described below to compare and contrast it with the circumstances of these surrenders - the surrender to the Crown, the involvement Crown officials in the making and witnessing of the transaction itself, the public nature of the transactions, their formality, their documentation, the detailed metes and bounds descriptions of the land, the public councils and assemblies of the band, the number of Chiefs and principal men affixing their totems to the surrender deed.[79]

The Cameron transaction, as the available evidence suggested, began with the interest in the particular land by the land speculator Malcolm Cameron. A letter dated August 12, 1839, addressed to the Lieutenant Governor Sir George Arthur, written by Malcolm Cameron, suggested that the Crown acquire the land that was later to become subject to the Cameron transaction. Another document dated September 3' 1839, found in the records of the Chief Superintendent of Indian Affairs Samuel Peter Jarvis, recorded a proposal from Chief Joseph Wawanosh. This proposal, allegedly the transcription of an address given by Joseph Wawanosh on September 3 at a meeting, suggested that the same land be surrendered for consideration in the form of money to be put towards agricultural

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[78] *Ibid* at para 19.

development. These two proposals are strikingly similar, and while Justice Campbell does not explicitly accuse Cameron of being responsible for this speech in the judgment, the implication that Cameron may have been involved in the Wawanosh proposal is strong. Seemingly, as a consequence of this suspicion Justice Campbell does not give much weight to this evidence, stating that while "it might arguably despite its frailties provide some evidence of Chippewa willingness to entertain negotiations, it provides no evidence of any intent to sell to Cameron and no evidence of any consent to the Cameron transaction."[80]

The actual agreement reached by Wawanosh, the other chiefs and Cameron is only documented in the evidence by correspondence between Cameron and officials in the Indian Administration. Three later letters dated November 9, 1839, contain descriptions of the deal. One letter is written by Malcolm Cameron to Sir George Arthur; one is by Cameron to Samuel Peter Jarvis; and one by the Assistant Indian Superintendent of Sarnia, William Jones to Peter Jarvis. These letters described a meeting on September 8, 1839 at which it had been agreed to by the Indians

> to sell the four miles on the rear of the reserve and grant four roads to the river.... for ten shillings per acre, with one thousand dollars down on the approval of the transaction by the Lieutenant Governor in Council and the balance in nine equal instalments.[81]

The meeting at which this agreement was struck, according to the letters

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[79] *Ibid* at para 38.

[80] *Ibid* at para 63.

describing it, was attended by four Chiefs, including Joseph Wawanosh and Malcolm Cameron. William Jones was not there, as his letter reflected that he had learned of the transaction after the fact from the chiefs that had attended the meeting. These letters comprise the documentary evidence of the transaction, as no formal surrender documents substantiated the transaction.

As a result of the descriptions contained in these above documents, Justice Campbell characterizes the transaction as private. As Justice Campbell describes:

> No contemporaneous document suggests it was anything more than a private meeting. There is no contemporaneous reference or report of any council or meeting of the band or the principal men. Every other land transaction involving the band, either before or after the Cameron transaction, records the communal intention of the Chippewas to sell their land, evidenced and affirmed in some kind of council or assembly of the band or at least of some meeting of chiefs and principal men. ...Unlike these other Chippewa land transactions, there is no such contemporaneous reference in relation to the Cameron transaction. There is simply no evidence that there was such a meeting. Had there been a meeting of council one would expect Cameron to mention it in his letters to Arthur and Jarvis and one would expect Jones, the resident agent, to know about it and to mention it. The failure to record any meeting or to refer to any authorization by the band, as was the invariable practice in relation to dispositions of land, reinforces the conclusion that there is no evidence of any such meeting. The meeting of November 8 1839 between Cameron and the three chiefs, and the interpreter, with the possible addition of a missionary, is described in terms of a private meeting. There is no evidence it was anything other than a private meeting and no evidence of any associated meeting or council of the band or the chiefs and principal men.[82]

In consequence, the meeting, and the transaction it concluded are described as a private meeting, and a private deal.

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[81] *Ibid* at para 67.

[82] *Ibid* at para 68.

After the events of the meeting of September 8, 1839, a veritable flurry of correspondence ensued amongst the Indian Administration officials. Once the particulars of the deal had been conveyed to Samuel Jarvis several letters were exchanged between Jarvis, Cameron and the Civil Secretary of the Executive Council, S.B. Harrison. Jarvis responded to Malcolm Cameron's proposal expressing concern over some of the terms–particularly the lack of interest to be paid on the unpaid balance. Jarvis also wrote a letter, enclosing the letter from Cameron to Harrison expressing the same concerns, adding that he was concerned the Chiefs may have thought that they be paid the money directly, rather than it being paid to the Crown and held on their behalf. In addition, he also states that if the transaction were to be allowed by the Crown it would be necessary to negotiate the surrender of the land to the Crown first.

On March 19,1840, without undertaking to negotiate a formal surrender, an order in council, proposed by Malcolm Cameron was approved by the Lieutenant Governor. This order stated that

> The Council think that the price offered, namely 10/- per acre for the Land applied for, is sufficiently low to offer every inducement to the Gentlemen desirous of purchasing, considering all the advantages of situation and of having a large tract of land under their entire control.[83]

Another order in council, to the same end, was passed on June 18, 1840. While further correspondence between the Chippewas and William Jones around this time suggests that the Chippewas knew that the land transfer was in contemplation, the language used still seemed to suggest that a surrender of the land had not yet been undertaken. Justice Campbell interprets this in the following way. He writes that "the descriptive language is in the future tense, consistent with an expectation on their part that there would be a surrender before any transaction was consummated."[84] While there were other letters written after the order in council was approved, they do not mention surrender, but deal with issues such as the critique of the clergy reserve system. On February 27, 1841, amidst the ambiguities, Malcolm Cameron made his first payment on the land to the Crown.

In the summer of 1841 disputes over the land subject to the Cameron transaction began. In June 1841 an effort to survey the lands was made. It was suggested that while the surveyors were there, it might be economical to survey the entire reserve. The Chippewa band however refused to allow a survey over the entire reserve. As a result in June 1942 only the lands subject to the Cameron transaction were surveyed. In 1851 settlers began to be placed on the land by Cameron. Around this time a dispute over road allowances emerged:

> [The local] townspeople took the view that the Cameron purchase resulted in a number of road allowances through the reserve to the river, and the Chippewas maintained their position that there was no right to make roads through the reserve. Cameron became involved in the dispute and by the spring of 1851 a compromise was reached whereby Cameron agreed to give up one of the four roads he claimed and the Chippewas agreed to permit a diagonal road through the reserve.[85]

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[83] Quoted in *Ibid* at para 88.

[84] *Ibid* at para 91.

[85] *Ibid* at para 123.

Through the course of this dispute, the historical record continues to demonstrate an ambiguity as to the issue of whether the land had in fact been surrendered by the Chippewa band. Indeed, the record at this point supports the allegation that there was no formal surrender.

During 1851, contemporaneous to the dispute over road allowances, Malcolm Cameron began disposing of the lands he had purportedly acquired. On August 11, 1853 the remainder of the purchase price was paid. The historical record shows that this was the first payment made after the initial payment made in 1841. Finally, on August 13, 1853, the actual patent that is in question in the case was granted to Malcolm Cameron. After the patent was granted, Cameron continued to sell off the land. The only direct post-patent reference by the Chippewas to the transaction concerns this issue of payment. At a meeting held on March 23, 1855 between the Chippewa band and Froome Talfourd, Joseph Brant Clench's successor in the position of Indian Superintendent for the Western District, several questions regarding the details of the Cameron transaction, such as the purchase price for the land, were asked.

Around the time of the initial dispute over surveying the reserve, other disputes were brewing with the Chippewa band. Justice Campbell believed these other disputes shed some light on the Cameron transaction. In 1843 an inquiry was launched into the actions of Joseph Wawanosh by Joseph Brant Clench, then Superintendent of the Western District, on the prompting of the Chippewa band. The allegations against Wawanosh included "mismanagement, causing discontent, appropriating more than his share of the annuity, gross favouritism in distribution, and not being the hereditary chief."[86] The result of the inquiry was the removal of Wawanosh as chief in 1844. While one of the general complaints levelled against him was that he was, as Justice Campbell quotes from one of the many Chippewa petitions from the time alleging Wawanosh's misconduct, "disposing of the Land Reserved for us our Wives and children with out our consent."[87] Despite this complaint however, there are no specific complaints about the Cameron transaction.

The story resumed again in 1979, when a researcher looking into a dispute over road allowances discovered that there seemed to be no record of a surrender of the land. On October 18, 1995 the Chippewa band commenced the action that is the subject of the Chippewas litigation.

III. The legal issues

The legal issues that had to be determined by the Superior Court, based upon the facts provided above, again appear to be rather simplistic when reduced to their simplest form. Again however due to the nature of contemporary Aboriginal law, they are far from easy. The two central issues were the following: 1) was the land properly surrendered to the Crown? and 2) what remedy should be ordered if the land had not been properly surrendered? These two issues, however, required the determination of several other subsidiary issues that had not all been settled in previous jurisprudence.

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[86] *Ibid* at para 116.

In order to determine whether the land had, in fact, been surrendered to the Crown it was necessary to determine what the requirements for a valid surrender to the Crown was at the time of the transaction. The Chippewa band alleged that the surrender procedures contained in the *Royal Proclamation*[88] were in force at the time of the transaction. In consequence, they argued that it was required that the land must be surrendered to the Crown at a public meeting held for that purpose by the Governor or Commander in Chief.[89] The Crown however argued that the surrender requirements in the *Royal Proclamation* were "not directly applicable"[90] but rather "applied to the disputed lands by referential incorporation in four other forms of legal authority."[91] Essentially, the Crown argued that if applicable at all, the surrender provisions emanated from the common law of Aboriginal title, and colonial habit.

On the issue of surrender Justice Campbell begins by exploring the content and significance of the *Royal Proclamation*. The *Royal Proclamation*, enacted on October 6 1763 by King George III had, according to Justice Campbell, a dual function. He explains that after the French had ceded New France to England the *Royal Proclamation* served to:

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[87] *Ibid* at para 117.

[88] *Royal Proclamation*, (U.K.), 14 Geo. III, c.83, s.4(a) [hereinafter, *Royal Proclamation*]

[89] *Ibid* at para 241.

[90] *Ibid* at para 243.

> introduce, into Quebec, English law and an elected legislature. Quite separate from these operations of civil government and judicial administration, the Proclamation made provisions to govern relations with the Indians. This part of the Proclamation was designed to secure the friendship and trust of France's former Indian allies and to counter the increasing dissatisfaction of the British Indian allies who thought that the conquering English entertained "a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their Lands. There was fear of an Indian war, particularly after Pontiac's war in the summer of 1763. The content and historical context of the Indian provisions demonstrate that, they were directed to two distinct goals; to prevent Indian unrest and to provide a measure of equity and justice for the King's Indian subjects... In the pursuit of those twin goals, conciliation and equity, the Proclamation recognized and affirmed the interest of the "Nations or Tribes of Indians", in their unceded lands, recited the mischief caused by private purchase of Indian lands, ("great Frauds and Abuses"), prohibited private purchase of Indian lands, and invalidated all sale of Indian land unless purchased under the six point surrender procedure...[92]

In order to affect this equity and justice for the Indian, the document prohibited the private sale of land to settlers and established that "if at any Time, any of the Said Indians...should be inclined to dispose of [their] lands, the same shall be Purchased only for Us, in our Name, at some publick Meeting or Assembly..., to be held for that Purpose by the Governor or Commander in Chief of our Colony."[93]

This document is important as it has been attributed as the founding document defining Crown-Aboriginal relations,[94] has only increased in

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[91] *Ibid.*

[92] *Ibid* at para 245-6.

[93] *Supra* note 88 at s.4(a).

[94] See *Calder v. British Columbia* [1973], S.C.R. 313 [hereinafter, *Calder*].

significance as time crept on. As Justice Campbell describes

> [f]or over two hundred years the *Royal Proclamation* has been regarded as the Magna Carta of Indian rights in North America. Successive decisions of the superior trial courts of Ontario, the Court of Appeal, the Supreme Court of Canada, the English Court of Appeal, the Privy Council, and the Supreme Court of the United States have enshrined it as a fundamental document of high constitutional importance. Successive generations of judges have taken it as the starting point for any just determination of aboriginal rights. Lord Denning, in the 1982 court challenge by aboriginal groups to the enactment of the *Constitution Act* 1982, expressed the settled understanding of the guarantees set out in the *Royal Proclamation*.[95]

As such, Justice Campbell accepts that barring repeal by the *Quebec Act*,[96] or other act, the *Royal Proclamation* surrender procedures were required for the valid surrender of Indian lands.

The next argument to be considered was the effect of the *Quebec Act* upon the legal surrender requirements for Indian land. The Crown had argued that the *Quebec Act* had altered the law by repealing the surrender requirements mandated by the *Royal Proclamation*. The *Quebec Act* was enacted in 1774 to solve some of the political and constitutional problems that the *Royal Proclamation* had failed to address in 1763. More specifically, the fact that the *Royal Proclamation* had "failed to recognize the Roman Catholic religion",[97] and "continue French civil law."[98] Additionally, there was a need to "expand the boundaries of the province of Quebec to include the interior Indian territory where the Proclamation forbade settlement, including the existing French settlements around the posts, for reasons of trade, territorial control, and Imperial security."[99] The *Quebec Act* thus confirmed French civil law, provided for religious tolerance for Roman Catholics, and extended Quebec's boundaries.

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[95] *Chippewas* (S.C.J.), *supra* note 1 at para 249 [footnotes omitted].

[96] *Quebec Act,* (U.K.), c. 83 [R.S.C. 1970, App. 11. No.2], [hereinafter, *Quebec Act*].

[97] *Chippewas* (S.C.J.), *supra* note 1 at para. 258.

[98] *Ibid.*

In attempting to fulfill these goals, two separate provisions were argued by the litigants to potentially affect the surrender requirements of the *Royal Proclamation*. The Chippewas argued that section 3 functioned to continue Indian rights to land as expressed in the *Royal Proclamation*. The section states the following:

> Provided always, and be it enacted, that nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise howsoever, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in Force, and have Effect, as if this Act had never been made.[100]

The Chippewas argued that by ensuring the maintenance of any "Right, Title, or Possession derived under any Grant, Conveyance or otherwise however",[101] the Chippewas retained the right to any land subject to the *Royal Proclamation* except the land to which proper surrender had occurred. Conversely, the Crown argued that section 4 of the *Quebec Act* repealed the *Royal Proclamation* surrender requirements. Section 4 states the following:

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[99] *Ibid.*

[100] *Supra* note 96 at s.3.

> And whereas the Provisions, made by the said Proclamation, in respect of the Civil Government of the said Province of Quebec, and the Powers and Authorities given to the Governor and other Civil Officers of the said Province, by the Grants and Commissions issued in consequence thereof, have been found, upon Experience, to be inapplicable to the State and Circumstances of the said Province, the Inhabitants whereof amounted, at the Conquest, to above sixty-five thousand Persons professing the Religion of the Church of Rome, and enjoying an established Form of Constitution and System of Laws, by which their Persons and Property had been protected, governed, and ordered, for a long Series of Years, from the first establishment of the said Province of Canada; be it therefore further enacted by the Authority aforesaid. *That the said Proclamation, so far as the same relates to the said Province of Quebec, and the Commission under the Authority whereof the Government of the said Province is at present administered, and all and every Ordinance and Ordinances made by the Governor and Council of Quebec for the Time being, relative to the Civil Government and Administration of Justice in the said Province, and all Commissions to Judges and other Officers thereof, be, and the same are hereby revoked, annulled, and made void, from and after the first Day of May, one thousand seven hundred and seventy-five.*[102]

The Crown argued that this general repeal provision had the effect of revoking the formal requirements that the *Royal Proclamation* had established. This position was strengthened by the existence of *obiter dicta* in the *Bear Island Foundation*[103] case which stated that "the relevant procedural aspects of the Proclamation were repealed by the *Quebec Act*."[104]

Justice Campbell however ultimately disagrees with the defendant's

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[101] *Ibid.*

[102] *Ibid* at s.4 [italics added].

[103] *Ontario (Attorney General) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 (C.A.); appeal dismissed [1991] 2 S.C.R. 570.

[104] *Ibid* at 410.

argument that the *Quebec Act* repealed the surrender provisions in the *Royal Proclamation* for several reasons. First he notes that the preamble of the *Quebec Act* dictates that the purpose of the statute was to address the "special needs of the former French subjects in relation to civil government, laws, and religious faith."[105] And indeed, no mention of Indians is made in the *Quebec Act*. Thus he reasons that it was "intended to repeal the concerns of one special class of the King's subjects, the French population of Quebec. There is no reference at all to the other special class of the King's subjects, the indians, or to their lands."[106] It is a matter of statutory interpretation, Justice Campbell argues, that the surrender provisions were not repealed.

The second line of reasoning Justice Campbell proposes to support the continuation of the surrender provisions is based on section 3 and its effects. He accepts the Chippewas' argument that if the *Quebec Act* preserved "any right, title, possession, derived under any grant, conveyance., or otherwise howsoever, of or to any lands within the said province, or the provinces thereto adjoining...as if this Act had never been made"[107] the Indian's possession in absence of formal surrender was also preserved. As Justice Campbell notes, "the procedural requirement for surrender, including a public meeting, or assembly of the Indians held for that purpose by the Governor of Commander in Chief, are not matters of mere form. They are inseparable from the general surrender which reflects a substantive element of aboriginal title at common law."[108]

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[105] *Chippewas* (S.C.J.), *supra* note 1 at para 268.

[106] *Ibid* at para 271.

[107] *Quebec Act*, *supra* note 96.

As Justice Campbell had decided that the land had not been surrendered, the next issue that had to be determined was what remedy should be awarded. The initial step Justice Campbell takes towards this end is to determine the legal validity of the patent as a result of the failure of the Crown to negotiate a proper surrender of the land. The Crown asserted that regardless of the lack of formal surrender, the patent extinguished the Chippewas' interest in the land. In essence, the defendants argued that colonial actions could derogate from Indian title, and thus could extinguish the Chippewas' interest in the land. If so, then the either the granting of the Crown patent to Cameron, or the passing of colonial legislation which was repugnant to the *Royal Proclamation* could have acted to extinguish the Chippewas' interest in the land. Justice Campbell however decides that "the colonies had no constitutional power to derogate from the Indian land surrender requirements in the *Royal Proclamation*."[109] Thus, the Crown patent could not extinguish the Chippewas' interest in the land for a variety of reasons. He explains:

> Because he had no statutory authority to patent the disputed lands, because he had no delegated prerogative authority to grant the patent, because he was prohibited from doing so by the *Royal Proclamation*, by the common law of aboriginal title, by the binding surrender procedures embedded by Crown practice into the common law, and by Treaty 29, Lord Elgin's patent to Cameron of the disputed lands was void *ab initio* and of no force

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[108] *Ibid* at para 280.

[109] *Ibid* at para 393.

or effect.[110]

Justice Campbell thus declared the Cameron patent void *ab initio*, or of having no force and effect from its granting.

The second half of the judgment, however, is concerned with the issue of whether any statutory limitation periods or equitable defences barred the Chippewa band's claim for the remedy of a declaration of possession. The defendants provided a list of various federal and provincial statutory instruments, which they alleged had the effect of barring the Chippewas from a remedy.[111]

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[110] *Ibid* at para 431.

[111] The Crown provided the following list of acts to be considered: *An Act for Limitations and Avoiding Suits in Law* (1623) 21 Jac. 1 c. 16 s. 3; *An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, instituted. An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever* (1769), 9 Geo. III. c.16, s.1 (Imp.); *An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign entitled "An Act for making more effectual provision for the Government of the Province of Quebec, in North America," and to introduce the English Law as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights* (1792), 32 Geo. III, c.1, s.3 (U.C.)*; An Act to Amend the Law Respecting Real Property, and to Render the Proceedings for recovering possession thereof in certain cases, less difficult and expensive* (1834), 4 Will. IV, c. 1, s. 16, 37 (U.C.); *An Act respecting Property and Civil Rights* (1859), C.S.U.C., c.9, s.1; *An Act respecting the Limitations of Actions and Suits relating to Real Property and the time of prescription in certain cases*, C.S.U.C. 1859, c.88, s.1, 16.; "1859 *limitations"An Act for the further Limitation of Actions and Suits relating to Real Property*, S.O. 1874, c.16, s. 1, s.15 "1874; *An Act Respecting the Administration of Justice*, R.S.O. 1897, c.324, s.38(3); *An Act adopting the Law of England in Certain Matters*, R.S.O. 1897, c.111, s.1; *The Statute Law Revision Act,* 1902, S.O. 1902, c.1, ss.2, 17; *Crown Liability Act*, R.S.C. 1985, c.C-50, s.32; *Federal Court Act*, R.S.C. 1985, c.F-7, s.39 (1), formerly R.S.C. 1970 (2nd Supp.) c. 10; *Indian Act*, R.S.C. 1985, c.I-5, s.88; *The Conveyancing and Law of Property Act* R.S.O. 1990 c. C.35, s. 39;. *Limitations Act*, R.S.O. 1980 c. L 15; *Limitations Act* R.S.O. 1990, c. L.15; *The Mortgages Act* R.S.O. 1990 c. M.40, s. 13; and *The Registry Act* R.S.O. 1990 c. R.20, s. 70.

These statutes can be classified into three general categories based upon the level of government enacting them: provincial statutes, federal statutes, and pre-confederation statutes. On the competency of provincial statutes to derogate from Aboriginal rights, Justice Campbell follows the weight of judicial authority,[112] determining that "[t]he provinces have no constitutional power to make laws in relation to Indians and lands reserved for the Indians."[113] On the issue of whether s.88 of the *Indian Act,*[114] stating that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this act",[115] Justice Campbell again follows the weight of judicial authority in deciding that Ontario statutes could not act to bar the Chippewas' claim,[116] as the Courts have maintained that provincial governments do not have the constitutional jurisdiction to extinguish Aboriginal title.

Justice Campbell decides that neither the federal statutes, nor the pre-confederation statutes analogous in constitutional authority have the sufficiently

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[112] While the case of *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010 [hereinafter *Delgamuukw*] is the most important authority for this proposition, as well as most other general propositions regarding Aboriginal title, Justice Campbell also cites *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654, *R. v. Smith*, [1983] 1 S.C.R. 554, and *R. v. Martin* (1917), 41 O.L.R. 79.

[113] *Chippewas* (S.C.J.), *supra* note 1 at para 476.

[114] *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

[115] *Ibid* at s.88.

[116] See *Delgamuukw*, *supra* note 112.

"clear and plain intent"[117] to extinguish the Chippewas' claim. The defence argued that the federal *Crown Liability Act*[118] and the *Federal Court Act*[119] imposed a limitation period barring the Chippewas' claim by incorporating the provincial limitation periods into actions against the Crown. In response to this allegation, Justice Campbell provides three reasons why these acts would not apply:

> The first is that the action against the representative defendants for the recovery of the disputed lands is not an action against the Crown and that, so far as the actions against the Crown are concerned, neither the Attorney General of Canada nor the Attorney General for Ontario has raised any limitation period. The second is that the application of the provincial limitation statutes to these lands would extinguish aboriginal title, a result that cannot be achieved without clear and plain Parliamentary intention conspicuously lacking in s. 32. The third is that s. 32 does not apply in the face of contrary provisions otherwise provided in Acts of Parliament, and the Indian Act otherwise provides a comprehensive system for the alienation of Indian land, a system completely inconsistent with extinguishment by provincial statute.[120]

The pre-confederation limitation acts are also declared inapplicable by Justice Campbell as they are simply equivalent to the federal statutes in competency, and as such are unable to limit the claim.

While Justice Campbell does not use the application of a statutory mechanism to bar the Chippewas' claim, he does use an equitable rule to bar the remedy. After an examination of the legal capacity of the Chippewas, Justice

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[117] See *Ibid.*

[118] *Supra* note 112.

[119] *Ibid.*

Campbell first explores the applicability of the defence of laches, acquiescence, estoppel and adherence. As a result of his conclusion that the Chippewas of Sarnia "only in the late 1970's and early 1980's" began to "demonstrat[e] the practical ability to exercise the diligence in respect of their legal rights that is required to launch and maintain an aboriginal land claim,"[121] he finds that the defence of laches, estoppel and acquiescence should not apply. He explains that

> these defences focus on the conduct of the Chippewas. They depend on the proposition that the Chippewas through delay or neglect or some kind of active or passive affirmation of the Cameron transaction have barred themselves from asserting their aboriginal rights in their disputed land. These defences differ from the defence of good faith purchaser for value without notice, which depends on upon any fault or negligence or lack of diligence on the part of the Chippewas conduct but rather upon the equities in favour of the innocent owners.[122]

The defence of *bona fide* purchaser without notice, however, lacks the element of fault that Justice Campbell finds repugnant with the previous equitable bars, as:

> [t]he defence of good faith purchaser for value without notice is fundamentally different from the fault-based defences of laches, acquiescence, estoppel and adherence, just discussed. Those defences depend on the proposition that the Chippewas through delay or neglect or some kind of active or passive affirmation have barred themselves from asserting their aboriginal rights in the disputed land. Those defences are based on the notion that the Chippewas are somehow to blame for the loss of their land. The defence of good faith purchaser for value without notice, discussed later is very different. It depends not upon Chippewa fault but upon the innocence of the present owners.[123]

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[120] *Chippewas* (S.C.J.), *supra* note 1 at para 502.

[121] *Ibid* at para 640.

[122] *Ibid* at para 657.

This defence, according to Justice Campbell, rests upon the "basic social value that protects the rights of the innocent parties."[124]

The Chippewas argued that this defence was inapplicable, as the doctrine of *bona fide* purchaser is an equitable doctrine that does not apply to legal interests. Justice Campbell however dismisses this distinction by calling this a "highly technical argument" that is outdated in an era long after the fusion of law and equity.[125] He explains that the defence can "extinguis[h] any ordinary legal or equitable interest in land," but then qualifies this statement by expounding the *sui generis* nature of Aboriginal interests. He explains however that "aboriginal title is no ordinary interest in land."[126] This conclusion leads him to determine that while the defence of *bona fide* purchaser can be applied, it must "meet the stringent tests used to measure laws that purport to extinguish aboriginal and treaty rights."[127] Thus the defence of *bona fide* purchaser is applicable to the *Chippewas* case, but it should be applied only if the particular instance is justified.

Justice Campbell then explores whether the application of a the *bona fide* purchaser rule is justified through applying "the test of reconciliation"[128] more

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[123] *Ibid* at para 682.

[124] *Ibid* at para 686.

[125] *Ibid* at para 738.

[126] *Ibid* .

[127] *Ibid* at para 739.

[128] *Ibid* at para 746.

commonly known as the *Sparrow* test in Aboriginal law–named for the case from which it first emerged.[129] This case addressed the question of how the constitutionalisation of "existing" Aboriginal rights in s. 35 was to be approached. Indeed, much like other areas of Canadian constitutional interpretation the Court creates a test which can be applied in order to determine whether the infringement of an Aboriginal right is justified. The questions that guide his inquiry into the fairness of applying the doctrine of *bona fide* purchaser are thus adapted from this test. Justice Campbell thus inquires into the following: i) "the nature of the aboriginal and treaty right",[130] ii) "the seriousness of the proposed interference with those rights",[131] iii) "whether the objective, asserted as justification for the interference, is sufficiently pressing and substantial",[132] iv) "the adequacy of other machinery to vindicate the aboriginal and treaty rights in some other form",[133] and v) "the impact of the measure on the reconciliation of aboriginal societies with the rest of Canadian society."[134]

While Justice Campbell emphasises the severity of extinguishing aboriginal title to unsurrendered lands, he ultimately decides that the interest of dynamic security of title[135] outweighs the interest in preserving this particular Aboriginal claim. In regards to the first part of the test, Justice Campbell notes that the entitlement at stake in the case is the absolute extinguishment of the Chippewas' "unceded unsurrendered treaty protected Indian title."[136] As such, with regard to the severity of the interference, it is the "ultimate form of interference."[137] Justice Campbell notes however that the Chippewas no longer have a "substantial connection"[138] with the land, and, in consequence, the severity of the interference is mitigated. As such, the remedy of damages would thus be adequate to address the harm done. In addition, he notes that the objective sought by the interference is adequately pressing and substantial, as security of title is a benefit to all. He argues that interfering with this particular aboriginal right, is in the interest of the entire Canadian population. He reasons that

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[129] *R. v. Sparrow* [1990] 1 S.C.R. 1070 [hereinafter *Sparrow*].

[130] *Chippewas* (S.C.J.), *supra* note 1 at para 750.

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

> The defence of good faith purchaser for value without notice is a fundamental aspect of our law of real property, embedded not only in the principles of common law and equity but also in the deep structure of our public policy to ensure fairness in all property transactions and to protect all innocent purchasers. The same is true of the principle of equitable

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[135] See, P.A. O'Connor, *Security of Property Rights and Land Title Registration Systems*, (Ph. D Thesis: Monash University, 2003). Dynamic security protects the facility of transaction through protecting the reasonable expectations of a purchaser against a third party through barring them from asserting a claim unless prior notice is given. This is the type of security facilitated by a Torrens system, for example. Static security instead protects, as O'Connor explains, "the interests of existing owners at the expense, if necessary, of purchasers." at 96.

[136] *Ibid* at para 751.

[137] *Ibid.*

[138] *Ibid* at para 752.

> limitations... These objectives benefit the overall interest of the community as a whole, aboriginal and non-aboriginal, in a system that promotes security of title and puts an end after a reasonable time to the threat of being sued for an ancient wrong committed by someone else. It is of compelling and substantial importance to the community as a whole that long settled purchasers for value, innocent of any wrongdoing and without prior notice of any claim, should be secure in the peaceable possession of their homes and workplaces, undisturbed by ancient title defects.[139]

As a result of the unconscionability of depriving the current owners of their land, and the greater community interest in security of title, Justice Campbell thus determines that applying the *bona fide* purchaser rule is warranted.

It is at this stage of the judgement that Justice Campbell's creativity shows through. In light of no applicable statutory limitation period, Justice Campbell states that "[t]he authorities support the proposition that equity in the absence of a common law or statutory limitation may, in the appropriate case, apply a period of limitation by analogy to statute."[140] Justice Campbell feels that a 60-year limitation period is just considering the "legal disability and incapacity of the Chippewas in 1861 and afterwards."[141] As such he creates a 60 year limitation period which, as he describes

> protects aboriginal property interests against immediate extinguishment on sale to a good faith purchaser. This protection is far more generous than that accorded to individual property interests and it protects at the same time the rights of innocent purchasers without notice. To balance these interests and apply an equitable limitation as an act of peace to protect the

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[139] *Ibid* at para 753.

[140] *Ibid* at para 761.

[141] *Ibid* at para 766.

> innocent purchasers and to leave the Chippewas with their legally adequate alternative remedy against the Crown, is constitutionally justified and contributes to the reconciliation of aboriginal societies with the rest of Canadian society.[142]

In consequence, the ultimate result of the case is a declaration that the Cameron patent was void *ab initio.* Relying on the importance of *bona fide* purchaser rule. However, the Chippewas' claim for possession was barred by a 60-year equitable limitation period. The motion sought by the Chippewas declaring "that the Chippewas of Sarnia Band enjoy continuing and unextinguished common law, aboriginal, treaty and constitutional rights in the disputed land [was thus] dismissed."[143]

IV. Conclusion

The purpose of this chapter was to create a fairly detailed picture of the narrative created by Justice Campbell in the *Chippewas* case. From this version of events the Chippewa were the unfortunate victims of an unscrupulous land speculator, left at his mercy by a corrupt chief and a defunct bureaucracy. Despite this, however, under the rule of law, it would be both unconscionable to deprive the current owners of their land, as well as detrimental to the stability of society to do so. Thus, the Chippewas' entitlement to the land was superseded by the entitlement of the current occupiers. Keeping this in mind, Kahn directs us to do the following:

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[142] *Ibid* at para 768.

[143] *Chippewas* (S.C.J.), *supra* note 1 at para 833.

> As with law's time, these shared beliefs about property can support competing and contradictory claims. Just as there is always more than one available precedent, there are always multiple stories of ownership. Any particular narrative is always exhausted before it reaches an incontrovertible foundation. It simply recedes into the past where, eventually, explanations fail. Law's space is not a just distribution from first principles. A property regime is an ongoing project in which the distribution has always already occurred. The cultural approach to law seeks to expose the structures of though that make this project possible. It is not concerned with the justice or injustice of property, nor with correct beliefs about particular property claims.[144]

Indeed, the Superior Court judgment demonstrates that the Chippewas' claim receded into the past, replaced by the importance of the stability of contemporary property rights. This is not to say that there was an absence of concern about reconciliation and justice. It however could be served by other means than restoring possession of the land.

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[144] Kahn, *supra* note 14 at 64.

Chapter 3: The Court of Appeal Judgment

I. Introduction

As Kahn has noted, a judicial decision is an attempt to portray an event in a particular way through suppressing alternative interpretations.[145] A comparison of the Superior Court decision and the Court of Appeal decision in the *Chippewas* case is demonstrative of how divergent these interpretations can be. Indeed, as a result of the nature of the record, or more precisely the indeterminacy of it, interpretation of both facts and law differs. This chapter will thus recount the version of the facts and the law found in the Court of Appeal decision with the purpose of providing the basis for further analysis to follow in the later chapters of this thesis.

II. The facts

On June 19-29th, 2000 the Ontario Court of Appeal heard the appeal from the summary judgement of Justice Archie Campbell of the Superior Court of Justice in the *Chippewas* case. The Crown also appealed the Superior Court's declaration that the Cameron patent was void *ab initio*. The Chippewas appealed the Court's dismissal of the Chippewas' claim for "continuing and unextinguished rights common law, statutory, aboriginal, treaty and constitutional rights in the disputed lands."[146] The landowners sought an order declaring the letters patent valid, the aboriginal interests in the land extinguished by the granting of the patent, and that any potential rights held by the Chippewas were barred by either statutory operation or equitable doctrine.

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[145] Kahn, *supra* note 14 at 125.

While the facts of the case were not in dispute, the approach of the Court, and the emphasis placed on certain facts, were quite different in the Court of Appeal judgment than in the Superior Court judgment. As the Court of Appeal decision states, the Court does not challenge what they refer to as "primary findings of fact".[147] They do however challenge what they call "inferences"[148] based upon the primary facts. The Court explains:

> The primary facts as found by the motions judge are not challenged. Some of the inferences he drew from those facts are, however, very much in dispute. In the unusual circumstances of these summary judgment proceedings, justice dictates that we approach the motions judge's findings of fact as though they were made at trial. We defer to the inferences he drew except where we conclude that they are based on a misapprehension of the evidence, a failure to consider material evidence, or where in the light of the totality of the undisputed primary facts, we conclude that the inferences the motions judge drew were unreasonable. As will become evident, we do not accept some of the inferences drawn by the motions judge.[149]

As a result it is necessary to describe the Court of Appeal's explication of the facts in order to understand these differences; they influence the legal result in the action.

The Court of Appeal begins its exploration of the facts through a general

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[146] *Chippewas* (C.A.), *supra* note 1 at para 12.

[147] *Ibid* at para 40.

[148] *Ibid.*

[149] *Ibid.*

historical overview of Crown-First Nation relations around the period relevant to the action. This summary discusses the initial haphazard basis by which these relations began. The summary continues on, into a description of the growing military importance of Aboriginal friendship as "French imperialist ambitions, aided and abetted by First Nations allies threatened the security of English interests in North America"[150] during the Hundred Years' War. Once the war with the French had ended in 1763, and the Treaty of Paris had been signed, the Crown thought that it was still necessary to maintain good relations with the Aboriginal inhabitants of the lands because of unrest to the south. As such, the Court describes the two dominant aspects of English Indian policy as being "viewed as involving relations between sovereign nations to be governed by agreements or treaties,"[151] and the policy of "actively pursu[ing]"[152] First Nation support through things like the land guarantees and procedural safeguards in the *Royal Proclamation*. These procedures, in the summary provided by the Court, continued to be important, and "[b]y the turn of the 19th century...were well established."[153]

The Cameron transaction was precipitated by a few other events that occurred at the beginning of the 19th Century. At this time there was increasing pressure for land following the War of 1812. This pressure for land was concomitant with a shift in Indian policy to that of civilizing the Indian. There was also a decrease of Aboriginal groups' military importance due to the newly gained security of the territory. As a result of these developments, the Crown sought to obtain the vast area of land in south-western Ontario controlled by the Chippewas.

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[150] *Ibid* at para 48.

[151] *Ibid* at para 51.

[152] *Ibid* at para 52.

[153] *Ibid* at para 61.

To reiterate the basic facts, also described in the Superior Court judgment, in October 1818 a meeting was held between the Indian department and "numerous Chippewa chiefs at Amherstberg to discuss the possibility of a surrender of Chippewa land."[154] An initial surrender of 500,000 acres of land was completed in July 1922. In April 1825, Treaty 27 ½ was finalized, surrendering 2.2 million acres of land, except for 4 reserves which were to be retained for the Chippewas. This treaty could not be concluded as there was lacking a "descriptive plan... attached to the surrender."[155] In consequence, Treaty 29, signed in 1827, which complied with this formality, confirmed the terms of this prior treaty. Included in the land reserved was a parcel, referred to as the Upper Reserve that ran along the St. Clair River. This land was desired by the white settlers in Port Sarnia as "[t]hey felt that the reserve was blocking key trade and communication channels along the St. Clair River and inhibiting the development of their town."[156]

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[154] *Ibid* at para 70.

[155] *Ibid* at para 77.

Despite statements made in 1830 and 1834 by Joseph Wawanosh that the Chippewas did not want to part with the segments of the Upper Reserve on the river, documentary evidence contradicted this hesitation. A transcription of one of Wawanosh's speeches stated the band wanted to sell some of the Reserve in order to fund agricultural enterprises. The circumstances surrounding this speech ,however, are, as the Court states, "lost in time."[157] In contrast to the Superior Court judge, the Court of Appeal does not find "any inherent contradictions"[158] in these seemingly opposing positions in regards to the disposal of land in the Upper Reserve because "[Wawanosh's] proposal to was consistent with the ongoing development of a permanent agricultural settlement on the Upper Reserve. Most of the land at the back of the reserve which Wawanosh indicated the Chippewas were prepared to give up was not as well suited for farming as the front reserve."[159]

Malcolm Cameron, encouraged by Samuel Jarvis to attempt to negotiate the cession of the land, thus met with Wawanosh and various other chiefs on November 9, 1839 and negotiated the sale despite hesitation on the part of the other chiefs. The Court explains this hesitation as a result of the fear of continued pressure from settlers for land. According to the Court, however, Cameron managed to calm their reservations, and concluded the deal:

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[156] *Ibid* at para 98.

[157] *Ibid* at para 100.

[158] *Ibid*.

[159] *Ibid*.

> [a]ccording to Cameron, he had the "confidence" of the chiefs and was able to convince them that he would adhere to any bargain they made. Cameron advised that he had concluded a bargain for the purchase of four square miles at the rear of the reserve furthest from the St. Clair River. According to Cameron, the Chippewas also agreed to provide four roads running from that block of land through the reserve to the river. Cameron said that he had agreed to pay the Chippewas 10 shillings per acre with an initial payment of 250£. The rest of the purchase price (1,020£) was to be paid in nine annual instalments. Cameron observed that the price was two shillings higher than the "government price", but that he had agreed to the higher price in lieu of paying any interest on the unpaid part of the purchase price. Cameron attached a rough map of the land which he said the Chippewas had agreed to give up. The map showed four roads running through the reserve to the river.[160]

After a deal was made, Cameron informed Chief Superintendent Samuel Jarvis of the deal that had been struck. Despite concerns on Jarvis's account about aspects of the agreement that deviated from Crown practice, two Orders in Council were passed approving the transaction. The first was passed on March 19, 1840. This Order stated the terms of the bargain, and the statement that the deal would be of "great public advantage as well as the benefit to the Indians."[161] An identical second order was passed in June 1840, except for the omission of an original stipulation for "an allotment of land for clergy reserves."[162]

The Court of Appeal then provides an insightful summary balancing the steps that were taken that conformed to a proper contemporaneous surrender of Indian land, and the aspects that were lacking. Among those heralded as the proper approach were the following: the fact that Crown permission had been sought to initiate bargaining, the fact that permission to enter into negotiations had indeed been granted, the fact that an interpreter was present, the fact that approval of the transaction was sought by both Cameron and Wawanosh, the fact that two terms were altered at the behest of the appropriate official, and the fact that the Lieutenant Governor had approved the transaction in its altered form. On a more substantive note, the Court also expresses the opinion that the deal was reasonable, and a logical step to be taken considering the context in which it was made. As the Court writes:

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[160] *Ibid* at para 103.

[161] *Ibid* at para 108.

[162] *Ibid*.

> The land which was the subject of the transaction was not on the part of the Upper Reserve the Chippewas had refused to part with in earlier discussions with the Crown in 1839. Much of it was not ideal for farming. If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with some success by November 1839.[163]

The transaction however was deficient in several attributes usually expected. These characteristics included the absence of direct involvement of a Crown official in the negotiations, as well as the absence of direct involvement of the Chippewas' General Council. Related to the latter, the Court notes that having three, not, say for example, five chiefs, was also insufficient. The lack of any formal document recording the transaction is noted, as well as the absence of a "descriptive plan of the lands signed by the appropriate Crown officials and the chiefs of the Chippewas."[164]

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[163] *Ibid* at para 111.

The preceding facts led the Court to several conclusions regarding the transaction. Initially, they conclude that the meeting at which the transfer was negotiated did not amount to a formal surrender, and indeed demonstrated "a failure to follow virtually every established procedure attendant upon the surrender of Indian land."[165] While this conclusion follows that of the Superior Court, the Court of Appeal contests Justice Campbell's characterization of the deal as a "private" transaction.[166] The Court disagrees with the Superior Court's characterization of the transaction as private due to the fact that several members of the civil service knew about the meeting. Also, while only three chiefs attended the meeting, others could well have known about it. Regardless of the Court of Appeal's opinion that the deal was indeed public, not private as the Superior Court determined, the Court of Appeal does agree with the Superior Court to the extent that no surrender was ever obtained.

The Court of Appeal's disagreement with the Justice Campbell's characterization of the deal as private is only one example of the divergent interpretation of the facts. For example, the absence of complaint about the

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[164] *Ibid* at para 112.

[165] *Ibid* at para 113.

Cameron transaction in the 1844 inquiry into Wawanosh's actions as chief leads the Court to infer that Wawanosh had indeed "acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known."[167] The Court's reasoning is that if the Chippewas were unhappy about the transaction they would have complained about it. The Bagot Commission Report in 1844, which reported the findings of this aforementioned inquiry into Wawanosh's actions as chief indeed fails to mention the Cameron transaction. The Court explains:

> That Commission examined in detail the affairs of the Indian Department, and was highly critical of the operation of that department. The Commission heard many complaints about unjust land transactions in the 1830s, but recorded no complaints or disputes with respect to the Cameron transaction. The Commission was well aware of the transaction and examined its monetary details at some length. The Commission concluded that Jarvis had placed the initial payment made by Cameron in the wrong bank account and the Commission was highly critical of Jarvis' record-keeping. Nowhere, however, is there any suggestion that the transaction did not have the approval of the Crown and the Chippewas, or that it was regarded by anyone as a "private deal" between Cameron and Wawanosh.[168]

The Chippewa General Council held in 1855 also supports the submission that the Chippewas accepted the transaction, as there were inquiries regarding the details of the transaction, and terms of payment. This, the Court reasons, supports the view that the Chippewas not only knew about the transaction, but accepted it.

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[166] *Ibid* at para 114.

[167] *Ibid* at para 140.

[168] *Ibid* at para 162.

This conclusion, the Court believes, is also bolstered by post-transaction events which support their inference that not only did the Chippewas "have a general awareness of the Cameron transaction as of May 1840 and knew that the land would be sold to Cameron",[169] but also had a "communal awareness"[170] and a "communal acceptance"[171] of the transaction. First, a letter from Jones to Jarvis in May 1940 is cited as supporting the Chippewas' acceptance of the transaction. This letter informed Jarvis that the Chippewas had proposed that they purchase a tract of land good for maple syrup production out of the proceeds of the Cameron transaction. This proposal, in the opinion of the Court, reflected that the Chippewas had in fact "embraced" the Cameron transaction as helping them to meet their communal goals.

The controversy that had erupted around surveying of the Chippewas' reserve was also interpreted as reflecting the Chippewas' acceptance of the transaction. The Court reasoned that if the surveying of the whole reserve was seen as so problematic, and ultimately never concluded, the fact that there was a survey of the Cameron land suggested several conclusions. The fact that the survey of the whole reserve never occurred demonstrates that "the Chippewas were perfectly capable of resisting attempts to intrude on their land."[172] It also demonstrated that the Chippewas "saw it as their right to prohibit survey" on the reserve land as it was still theirs, but not on the land subject to the Cameron transaction as "white settlement of the disputed lands was imminent."[173] Finally, the Court concludes that the open and notorious presence of a surveyor on the Cameron lands in May 1842, without protestation or complaint from the Chippewas, warranted the conclusion that the Chippewas accepted the transaction.

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[169] *Ibid* at para 146.

[170] *Ibid.*

[171] *Ibid.*

[172] *Ibid* at para 152.

While the Court recognizes the difficulties that can potentially occur when relying on a historical record produced solely by non-Aboriginal peoples,[174] the Court finds that the dynamic between the Indian Administration, the Chippewas and Malcolm Cameron is a mitigating factor. The Court writes:

> In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English. In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of

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[173] *Ibid.*

[174] See, M. Asch & C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 Queen's L.J. 503 for a discussion of evidentiary difficulties in Aboriginal title litigation.

> those who may have voiced any opposition to Wawanosh's actions.[175]

The Court also cites other incidents supporting the assertion that the Indian Administration was indeed effective in protecting the Chippewas against the threats posed by white settlers. An aborted land transaction of 1843, when at a meeting between the townspeople of Sarnia and the Chippewas principal men, the townspeople mistakenly thought that they had made an agreement to sell the land later subject to the Cameron transaction, is interpreted as demonstrating the vigilance of the Indian Administration. This conclusion is drawn because, although the Indian Administration initially believed that a deal had been struck, it arranged a meeting with the principal men and discovered that the band was not interested in disposing of any land. The dispute over road allowances in the 1850's also suggests to the Court that the Indian Administration acted to protect the Chippewas' interests against the demands of white settlers by demonstrating impartiality. The Court thus concludes that the Indian Administration possessed a "willingness...to support the Chippewas' position even against the persistent claims of the white settlers."[176]

In consequence, the Court makes several findings. First, they find that the Crown had, during the time of the Cameron transaction, recognized and required the surrender procedures in the *Royal Proclamation*. They determine that three chiefs, including Joseph Wawanosh, negotiated the transfer of the disputed land, which was consistent with the "civilization policy of the Crown."[177] The Indian Administration, and the Crown it represented, then mistakenly came to believe the land had been surrendered, and a patent was issued. This important step of surrender however, was not ever taken. As a result there is "no evidence of the existence of a communal intention to surrender the disputed lands to the Crown at any time."[178] This state of disorderly affairs, the Court concludes, was the result of the "dysfunctional state of the Indian Department and the neglect of those charged with the responsibility of obtaining surrender."[179] Despite the Court's conclusion that the deal Wawanosh and the other chiefs negotiated was not done with the requisite authority, the band *post facto* accepted the transaction. This was done "in the twenty years following the transaction [because] those Chippewas affected by it both acknowledged and accepted it. They regarded the disputed lands as no longer part of their Upper Reserve, and insisted that they obtain what was due to them under the terms of the transaction."[180] The Court also notes that the repudiation of the transaction first emerged 140 years after the transaction had occurred.

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[175] *Chippewas* (C.A.), *supra* note 1 at para 142.

III. The legal issues

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[176] *Ibid* at para 176.

[177] *Ibid* at para 184.

[178] *Ibid.*

[179] *Ibid.*

[180] *Ibid.*

The Court of Appeal also differed from the Superior Court with regard to the interpretation of the law. First, while based upon the above presented facts, the Court finds that there had been no surrender of the land in question, they differ on the source from which this requirement emanated. Rather than finding that the *Royal Proclamation* was the legal foundation of this requirement, as the Superior Court did, they determine that it instead survived as only an enforceable legal custom. The Court "do[es] not find it necessary to make any final determination on the precise legal status of the *Royal Proclamation*";[181] but instead states that:

> [i]n the light of our findings on the evidence before us that whatever the formal legal status of the *Royal Proclamation* subsequent to the passage of the *Quebec Act*, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender... little turns in this case on whether the surrender provisions per se of the *Royal Proclamation* had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the *Royal Proclamation* and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.[182]

Title to Indian land could thus not be extinguished, except through the procedures mandated in the *Royal Proclamation*, but not necessarily through the force of that particular law. The Court finds it sufficient to decide that if the Crown and the

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[181] *Ibid* at para 202.

First Nations continued to recognize the surrender procedures then these procedures were indeed required. This conclusion is bolstered by modern Aboriginal title jurisprudence that emphasises the source of Aboriginal title as prior occupation, rather than the *Royal Proclamation*.[183]

In answer to the landowners' and the province of Ontario's appeal of the motion judge's decision that no statutory act, either provincial or federal, functioned to bar the Chippewas' claim; the Court of Appeal followed the Superior Court. While the Court recognizes that prior to the entrenchment of Aboriginal rights in 1982, the Crown did have the power to unilaterally extinguish Aboriginal rights and entitlements, there is a requirement that the legislation alleged to extinguish the right express a requisite "clear and plain" intention. None of the legislative acts in question, alleged by the defendant to extinguish the Chippewas' entitlements displayed such an intention.

While no statutory bars to the Chippewas' claim existed, there is an abundance of equitable limitations that the Court imposed to defeat the Chippewas' claim to possession of the land. The starting point of the Court's analysis of remedies is the *sui generis* nature of Aboriginal title. The Court posits that

> [t]he issue of remedies and equitable defences, like the other issues in this case, has both public and private law dimensions. The aboriginal right asserted by the Chippewas has been described as *sui generis* in nature. The

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[182] *Ibid* at para 198.

[183] See *Delgamuukw*, *supra* note 112 at 1091-2.

> *sui generis* nature of aboriginal title reflects the interaction between traditional aboriginal values and those of European settlers and consequently, aboriginal title is not readily classified in the conventional categories of the English common law tradition. In some respects, aboriginal title draws upon the concepts of public law. The rights it embraces are communal in nature and can only be understood in the context of the unique relationship between the Crown and the aboriginal community asserting the right. At the same time, aboriginal title has been held on the highest authority to be a right of property and it cannot be described or understood except in relation to the concepts of traditional common law private property rights.[184]

This passage explains that the special nature of aboriginal title mandates that it be understood as both a public law concept, and a private right to property. What this passage implicitly suggests is that aboriginal title is fundamentally a relational concept. The core elements of aboriginal *sui generis* title seem to have to be derived from its interaction with the authority of the Crown, and with the rights of the third parties involved. The Court further explains that

> The remedies claimed by the Chippewas reflect the dual public and private law dimensions of aboriginal title. As against the Crown, the Chippewas impugn the validity of the exercise of the Crown prerogative, invoking the principles of public law and the remedies available to challenge the legality of governmental action. At the same time, the Chippewas assert a claim to a property right against the private citizens who are the present occupiers of the property, invoking the legal principles governing the reconciliation of competing claims to private property. It follows that defences bearing upon the availability of remedies in both the public and private law settings must be considered. [185]

Thus, the Chippewas' right to the possession of property, according to the Court of Appeal, must be evaluated as against both the Crown and the third parties under public and private law.

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[184] *Chippewas* (C.A.), *supra* note 1 at para 244.

[185] *Ibid* at para 245.

The Court of Appeal's analysis of public law remedies begins with an exploration of the history of the relevant prerogative writ that would have historically been used to challenge the validity of a Crown patent–*Scire Facias*. The writ of *scire facias*, as well as the other common writs, the Court explains, are by nature discretionary. The Court explains:

> One of those foundational principles is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs. The fact that the writ of *scire facias*, like the other prerogative writs, were said to issue "as of right" did not detract from the court's discretion to grant relief to the party invoking its jurisdiction. There is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case. A person aggrieved is entitled "as of right" to invoke the writ to bring the matter before the court. It remains for the court to decide how to dispose of the complaint, and in deciding the matter, the court does have a discretion to exercise. This point is explained by Wade, *supra* at 718: "the fact that a person aggrieved is entitled to *certiorari ex debito justitiae* does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy." Similarly, Beetz J. observed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at 575-6:
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>> The use of the expression *ex debito justitiae* in conjunction with the discretionary remedies of *certiorari* and *mandamus* is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.
>>
>> *Ex debito justitiae* literally means "as of right", by opposition to "as of grace" (P.G. Osborne, A Concise Law Dictionary, 5th ed.; Black's Law Dictionary, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.[186]

This discretion, in the eyes of the Court highlights the relational, or "polycentric"[187] nature of the "rights and interests"[188] in a claim which challenges acts of government, such as patents. As such, it is thus necessary that "[t]he rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration."[189]

As a result of this discussion of the fundamentally discretionary nature of the remedy pleaded, the Court concludes that the Superior Court's approach towards the validity of the patent was misguided. The Court reasons that the discretionary nature of public law indeed makes legal distinctions between void and voidable patents rather superfluous. The Court writes:

> The motions judge analyzed this aspect of the case in terms of whether the Cameron patent was "void". He held that the Cameron patent was "void". A "void" patent is said to be one that has no legal effect whatsoever, while a "voidable" patent is one that does have effect unless and until it is set aside. Whatever its merits for other purposes, the language of "void" and "voidable" seems to us to be not a particularly apt or helpful analytic tool in the present context. From a remedial perspective, the inherent discretion of the court is always in play. As Wade has explained, *supra* at 343-4, the term "void" is "meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation." Wade adds, at 718, in relation to the discretionary nature of judicial review, "a void act is in effect a valid act if the court will not grant relief against it." See also Jones and de Villars, *supra* at 404. Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside. In our view, the issue is more clearly put and understood in terms of the discretion to grant or withhold a remedy and the factors that must be considered in relation to the exercise

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[186] *Ibid* at 253.

[187] *Ibid* at para 257.

[188] *Ibid*.

[189] *Ibid* at para 258.

> of that discretion. In fairness to the motions judge, it should be mentioned here that the arguments regarding the discretionary nature of public law remedies do not appear to have been presented to him with the same force and clarity as they were in this Court.[190]

The Court thus approaches the validity of the patent in a very pragmatic manner, attempting to "reconcile the fundamental nature of aboriginal rights, and the overarching importance of according due recognition to those rights, on the one hand, with the discretionary nature of public law remedies on the other."[191] Indeed, the Court even refers to other Aboriginal rights cases that emphasize how, despite their constitutional nature, Aboriginal rights and entitlements are not absolute and require the Court to affect "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[192]

In order to affect this reconciliation, the Court suggests that there are "established legal principles" which can be used to guide the inquiry. The Court uses the factors discussed by Justice Gonthier in *Immeubles Port Louis Ltee*[193] in order to guide the Court's discretion as to whether or not they should grant a remedy. The first factor the Court examines is "the nature of the disputed act, the nature of the illegality committed and its consequences."[194] The Court determines that, in light of the acceptance of the transaction by the Chippewas, the fact that "from a purposive perspective, many of the elements of a formal surrender were accomplished",[195] and the involvement of the Indian Administration, the Court decides it would be fair to deny a remedy. The second factor the Court examines is the "nature of the delay and its consequences."[196] With regard to this consideration, the Court gives deference to the Justice Campbell's finding that the Chippewas were "historically vulnerable"[197] and lacking in "formal legal capacity."[198] The Court also notes however that the Chippewas had known that the land had been transferred and failed to take any action to reclaim it for 100-150 years. The Court therefore can find no "adequate explanation for the delay"[199] to merit the deprivation of the current landowners interests. The Court thus explains that:

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[190] *Ibid* at para 261.

[191] *Ibid* at para 264.

[192] Cited in *Ibid* at para 263, from *R. v. Vanderpeet* [1996] 2 S.C.R. 507 at 539.

[193] *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326.

> The second factor is the nature of the delay and its consequences for third parties. We are not satisfied that there has been any adequate explanation for the delay that should lead us to excuse its impact. In assessing the delay, due consideration must be given to the motions judge's findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal

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[194] Cited in *Chippewas* (C.A.), *supra* note 1 at para 268, from *Ibid* at 372.

[195] *Chippewas* (C.A.), *supra* note 1 at para 270.

[196] *Ibid* at para 273.

[197] *Ibid.*

[198] *Ibid.*

[199] *Ibid* at para 273.

> claims until the late 1970s or early 1980s. However, the delay here went well beyond failure to take legal proceedings. The motions judge found that as early as 1851, the Chippewas knew that their lands had been taken without a formal surrender. The Chippewas knew that the lands had been sold, as confirmed by their inquiries about payment of the price. Despite the obvious fact that settlers were on what had formerly been reserve lands, there was not a whisper of complaint from the Chippewas. Moreover, with respect to other matters affecting their interests, the Chippewas demonstrated both the ability and the willingness to bring grievances to the attention of the appropriate officials. A court cannot ignore the fact that for more than 150 years, the Chippewas made no complaint whatsoever of the evident possession by others of lands formerly within their reserve. The Chippewas gave no indication of any dissatisfaction with that state of affairs and gave every indication that they fully accepted and acquiesced in the transfer of their lands. A delay of this nature and length brings the Chippewas' situation squarely within the category of case where, on established legal principles, the court will refuse to grant a remedy.[200]

In consequence, the court determines that despite the special constitutionally protected nature of Aboriginal rights it was warranted in these "exceptional circumstances"[201] to uphold the validity of the Cameron patent. The absence of a formal surrender in the circumstances thus did not warrant the dispossession of the current owners.

The court also decided to apply equitable limitations that emanate from what they call the "perspective of the private law of property."[202] While the Chippewas argued that equitable limitation periods did not apply to Aboriginal title, and hence the Court had no discretion to deny a remedy, the Court decides that the remedy sought by the plaintiffs is ultimately "equitable in origin and discretionary in nature."[203] The Court underlines that a declaratory remedy, such as a declaration of possession, is an equitable and hence a discretionary remedy.

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[200] *Ibid.*

[201] *Ibid* at para 275.

Additionally, the Court rejects the argument that equitable principles are not applicable to Aboriginal title. The Chippewas relied on the Aboriginal title cases, *Guerin*[204] and *Delgamuukw*[205] which state that Aboriginal title is not an equitable property right, but a *sui generis* legal interest in property. The Court however contextualises this statement in the following manner:

> These statements must not be taken out of context. They reflect the repudiation by the Supreme Court of Canada of the view that aboriginal title is a mere interest, held by grace and at the pleasure of the Crown. The important recognition of the legally enforceable nature of aboriginal title does not, however, reflect a rigid classification of aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of a common law origin. By insisting that aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify aboriginal title in terms more relevant to the 19th century, pre-Judicature Act, pre-fusion of law and equity phase of our legal development.[206]

In support of this conclusion the Court emphasises the *sui generis* nature of Aboriginal title. The unique nature of Aboriginal title, in the opinion of the Court, imparts the need for the Courts to consider the substance of Aboriginal entitlements instead of dogmatically applying potentially inappropriate analogous common law rules. In addition the Court reasons that a concept, such as

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[202] *Ibid* at para 276.

[203] *Ibid* at para 281.

[204] *R. v. Guerin* [1984] 2 S.C.R. 335. [hereinafter *Guerin*].

[205] *Delgamuukw, supra* note 112.

Aboriginal title, so "influenced and shaped by equitable principles",[207] such as the fiduciary relationship between Aboriginal peoples and the Crown, should not be immune to equitable principles. In addition, the Court states that "the modern conception of our private property law as a fusion of equitable and legal principles provides added weight to the argument that discretionary factors associated with equitable remedies may be considered."[208]

With this conception of the law in mind, the Court thus begins to analyse the specific rules being argued in the action. As for the *nemo dat* rule, the Court refers to the English case of *Alcock v. Cooke*[209] as authority "that the *nemo dat* principle did not render void all Crown patent of land to which the Crown lacked title."[210] The Court explains the principle in this case as follows:

> in the case of the Crown, the *nemo dat* rule was based on the notion that in making a subsequent grant of lands the Crown had already conveyed to another, the Crown must have been deceived. As Crown grants were "enrolled", in other words, officially recorded, the subject had the means of determining what grants had been made and was under a duty to inform the King of the existence of the prior grant before accepting a subsequent grant. It followed that the recipient of the grant previously made to another could assert no claim under the subsequent grant. However, where the Crown granted lands that were not subject to an "enrolled" grant, the court stated that the doctrine had no application.[211]

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[206] *Chippewas* (C.A.), *supra* note 1 at para 285.

[207] *Ibid* at para 286.

[208] *Ibid* at para 290.

[209] (1849), 130 E.R. 1092 (Eng. C.P.).

[210] *Ibid* at 294.

[211] *Ibid.*

While this precedent would, at first glance, seem to be more analogous to a typical situation where two competing non-Aboriginal interests exist over the same parcel of land, the Court further explains that this case supports their allegation that "established legal principles require that the interests of innocent third parties must be considered."[212]

The Court finds further reason to bar the Chippewas' claim in the doctrine of laches and acquiescence. These legal doctrines allow a Court to refuse to grant a remedy when the holder alleging the infringement of a particular right had known it had been infringed but fails to enforce it, thus causing either damage to the party he or she wished to enforce it against, or reasonable reliance that the right shall not be enforced.[213] The two considerations relevant to the application of these doctrines, the Court explains, are identical to the considerations in public law remedies. As such, the Court's finding that the Chippewas accepted the transaction by failing to assert a claim for 150 years, and the finding that there was reliance on the part of the landowners on the validity of the deed, prompted the Court to the conclusion that the current "situation...would be unjust to disturb."[214] Indeed, even the argument that the Chippewas did not know the actual terms of the transaction, as evidenced by the Chippewas' queries in regards to the terms at the General Council of March 1855, was not sufficient to dissuade the Court from applying these equitable limitations. While in *Guerin,* Justice Dickson of the Supreme Court stated that an Aboriginal claim could not be barred by laches and acquiescence if the band did not know the terms of the transaction,[215] the Court of Appeal took a more purposive approach to this rule. The Court of Appeal first decides that "the specific terms of the Cameron transaction are not an integral element of the Chippewas' claim in the present case"[216] as the claim was based on the invalidity of the patent. Second, the Court is of the opinion that regardless of the lack of knowledge of the exact terms, the Chippewas had enough knowledge to launch a claim if they had desired to. The defences of laches and acquiescence were thus applied to bar the Chippewas' claim.

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[212] *Chippewas* (C.A.), *supra* note 1 at para 295.

[213] See *Willmott v. Barber* (1880), 15 Ch. D. 96; and *Institut national des appellations d'origine des vins & eaux-de-vie v. Andres Wines Ltd.* (1987), 16 C.P.R. (3d) 385 (Ont. H.C.).

[214] *Chippewas* (C.A.), *supra* note 1 at para 299.

On the issue of the application of the good faith purchaser rule the Court overrules the motions judge's imposition of a 60-year equitable limitation period, and instead applies this equitable bar to the Chippewas' claim as a result of the factual circumstances. The Superior Court's creation of a 60-year equitable limitation period, according to the Court of Appeal is "not supportable by law."[217] The Court of Appeal however finds that it would be perfectly reasonable to refuse to grant the remedy requested on the facts of the present action. The Cameron patent, is thus declared valid, and the Chippewas' motion denied.

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[215] See *Guerin, supra* note 205 at para 67-69.

[216] *Ibid* at para 301.

[217] *Ibid* at para 308.

IV. Conclusion

One does not have to look very closely to recognise that the Superior Court and the Court of Appeal have different versions of the facts and the law in the *Chippewas* case. The Superior Court's version of the facts emphasises the innocence of the Chippewas. The Court of Appeal's version emphasises their participation. This difference manifests itself in the legal results at each Court level as the Superior Court relies on the defence of bona fide purchaser while the Court of Appeal focuses on the bar of laches and acquiescence.

The purpose of these last two chapters has been to present these different versions in a dispassionate manner rather than attempting to make judgments on which interpretation is more valid. As such, the last two chapters were merely an attempt to provide the basis for both the doctrinal analysis contained in the next chapter, and the analysis based upon Paul Kahn's methodological paradigm to follow in part two of this thesis.

Chapter 4: Doctrinal Aspects

I. Introduction

The previous two chapters contained an exposition of the findings of fact and law in the Supreme Court and the Court of Appeal judgments in the *Chippewas* case. The aim of this chapter will be to engage in a doctrinal analysis of these judgments, with the purpose of setting up my argument in the chapters to follow through demonstrating that the *Chippewas'* decision, with both Courts' use of broad discretionary powers, make this case a good 'text' to examine for its ideological tendencies. In order to do this a brief summary of the nature and source of Aboriginal title will first be presented.[218] A discussion of the ways that Aboriginal title may be extinguished will then be advanced. Next, a brief explanation of the jurisprudence surrounding other Aboriginal rights, such as site-specific rights, will be presented, as it plays a role in the Superior Court, and the Court of Appeal judgment. I will then conclude with a discussion of Kent McNeil's thesis that this case indeed creates a new method of extinguishing title–through judicial discretion.

II. The nature and source of Aboriginal title

The characteristics and source of Aboriginal title, through litigated often, are still rather oblique. To use former Chief Justice Lamer's words, "the jurisprudence on aboriginal title is somewhat underdeveloped."[219] As a result, in *Delgamuukw*, a case that has been subsequently called "the most important land title case in Canada's history,"[220] the Supreme Court set out to address this lack of body and clarity on the subject of Aboriginal title.

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[218] The exploration of this issue will be admittedly brief. For an excellent, detailed, but dated discussion of the foundation of Aboriginal title see B. Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Sovereignty* (D. Phil Thesis, Oxford University, 1979); K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

In early jurisprudence Aboriginal title had been characterized as a "personal and usufructary right, dependent upon the good will of the sovereign."[221] Later, in *Calder*,[222] it was characterized as a *legal* right not emanating from the *Royal Proclamation*, but rather from pre-existing occupation. The *Guerin* case then attempted to characterize Aboriginal title interests in light of the this often confusing and contradictory precedent. In this case, then Dickson thus explains that:

> Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the characterization quite accurate.[223]

He concludes that Aboriginal interests are "a legal right to occupy and possess certain lands." He further explains that their interest is neither beneficial ownership, nor a personal interest. Indeed, Aboriginal interests are "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indian's behalf when the interest is surrendered."[224]

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[219] *Delgamuukw, supra* note 112 at para 119.

[220] See *Delgamuukw: The Supreme Court of Canada Decision of Aboriginal Title* (Vancouver: Greystone Books, 1998) on bookjacket.

[221] *R. v. St. Catherine's Milling and Lumber Co.* (1889) 2 C.N.L.C. 541 (J.C.P.C.) at 549.

[222] See *supra* note 94.

While the *Guerin* case had set the stage for the elaboration of Aboriginal title, *Delgamuukw* is the case that attempted to fully elaborate upon it. This case is establishes that the three important characteristics of Aboriginal title are its inalienability except to the Crown, its source in Aboriginal prior occupation, and the fact that it is communally held.[225] Lamer, C.J. summarizes that:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.[226]

Aboriginal title is thus a right emanating from the occupation of Aboriginal peoples of the land prior to European settlement, which can be characterized as communal and inalienable and allows Aboriginal peoples the right to use the land for any purpose except for uses that are irreconcilable with their attachment to the

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[223] *Ibid* at 382.

[224] *Ibid.*

[225] See *Ibid* at para 111-116.

land.

III. Extinguishment of Aboriginal title

The generally accepted methods by which Aboriginal title can be extinguished are through valid surrender, or unilateral state action until the enactment of s.35 of the *Constitution Act*[227] in 1982.[228] The foundation of the surrender procedures in Canada is the *Royal Proclamation*, which dictated that lands could only be surrendered "at some public Meeting or Assembly of the said Indians, to be held for that Purpose,"[229] forbidding the private purchase of Indian lands. This model is also followed in the statutory surrender procedures enshrined in the *Indian Act*[230] for the absolute surrender[231] of reserve land as well.

The other well accepted method, at least prior to the enactment of s. 35 of

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[226] *Delgamuukw, supra* note 112 at para. 111.

[227] *Constitution Act*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44. S.35(1). [hereinafter, *Constitution Act*] This section "recognized and affirmed" "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."hence limiting the ability of the Crown to unilaterally extinguish Aboriginal title. See also, *Delgamuukw, supra* note 112 at para 172 where C.J. Lamer writes "for aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision."

[228] See J. Henderson, M. Benson & I. Findlay, *Aboriginal Tenure in the Constitution of Canada,* (Scarborough: Carswell, 2000) [hereinafter, *Aboriginal Tenure*] at 364-372 for a good general discussion of extinguishment theories.

[229] *Royal Proclamation, supra* note 88.

[230] See *supra* note 114 at s. 39.

[231] While section 39 of the *Indian Act* contains the requirements for valid surrender of all interests in the land, there are also large portions of the Act that

the *Constitution Act*, by which Aboriginal title can be extinguished is through unilateral state action. This mechanism is a power exercisable only by the Federal Crown, or its pre-Confederation equivalent,[232] as *Delgamuukw* authoritatively decided. This case decided that the provinces do not have the jurisdiction to extinguish Aboriginal title by virtue of s. 91(24), which gives the federal government power to power to legislate in relation to "Indians, and Lands reserved for Indians."[233] They can not however extinguish Aboriginal title in those lands.[234] Additionally, the federal Crown's power of unilateral extinguishment is also limited by the requirement, "fundamental to the parliamentary system of government that Canada received from Britain that legal rights can only be infringed or taken away by or pursuant to unequivocal legislation."[235] This imparts the obligation that in order to extinguish an Aboriginal right, even prior to 1982, the legislation alleged to extinguish the right must evince the necessary clear and plain intent. As C.J. Dickson opines in *Sparrow*, which is subsequently adopted in *Delgamuukw:*

> In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 568:

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deal with the surrender of partial interests such as oil rights.

[232] See *Chippewas*, (C.A.), *supra* note 1 at para 236-42. See also McNeil, *supra* note 8 at 308-327.

[233] *Constitution Act, supra* note 222 at s.91(24).

[234] See *Delgamuukw*, *supra* note 112 at para 172-183.

[235] K. McNeil, *supra* note 8 at 309.

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

> See also *A.G. Ont. v. Bear Island Foundation, supra*, at pp. 439-40. That in Judson J.'s view was what had occurred in *Calder, supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'* " (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.[236]

It would be thus be correct to say that pre-1982, while the federal Crown had the power to unilaterally extinguish Aboriginal title, the Courts will not allow the extinguishment of Aboriginal title without the Crown demonstrating a requisite level of clear and plain intent in the instrument which is purported to extinguish. In other words, mere inconsistency is not enough.

IV. Aboriginal rights post-1982, and the relevance of jurisprudence on other Aboriginal rights

Post-1982, other rules apply.[237] While section 35 may have constitutionalised existing Aboriginal rights, they are not, as them Chief Justice Lamer insists, absolute. He writes in *Delgamuukw* that:

> The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of

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[236] *Delgamuukw, supra* note 112 at para 37.

[237] See *Aboriginal Tenure*, *supra* note 223 at 372-395 for a good discussion of the constitutional aspects of Aboriginal tenure.

justification.[238]

In order to find a way to limit existing Aboriginal rights the Court in *Delgamuukw* draw upon the jurisprudence on other Aboriginal rights, such as the right to fish,[239] hunt,[240] or engage in the harvesting of timber,[241] to develop a test to determine whether the infringement of existing Aboriginal title is justified.[242] Thus the *Sparrow* case, and the *Van der Peet* trilogy[243] must be mentioned, especially in reference to the justification test for infringing Aboriginal rights.

The *Sparrow* case, dealing with Aboriginal fishing rights, not only establishes important precedent on the proof and definition of Aboriginal rights, but also establishes a *Oakes*-like[244] test for justifying the infringement of such continuing rights despite their constitutional protection. The *Sparrow* test first mandates a Court to determine if a *prima facie* infringement has occurred. The first aspect of this inquiry is if it is a reasonable limitation of the right.[245] This is explained as an investigation as to "whether either the purpose or the effect …unnecessarily infringes the interests protected by the …right."[246] The next aspect of this inquiry to determine if a *prima facie* infringement has occurred is if "the regulation impose[s] undue hardship…"[247] Finally a Court must determine if "the regulation den[ies] to the holders of the right their preferred means of exercising that right…"[248] Chief Justice Dickson, and Justice LaForest also make clear that "the onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation."[249] If a *prima facie* infringement has been found, the Court must determine if the infringement can be justified. As Dickson C.J.C. and LaForest J. write:

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[238] *Delgamuukw*, *supra* note 112 at para 160.

[239] See *Sparrow*, *supra* note 129.

[240] See *R. v. Bernard*, [2002] 2 C.N.L.R. 200 (N.S C.A.).

[241] See *Ibid.*

[242] While the court has differentiated site-specific rights and rights emanating from specific activities integral to a distinctive culture from Aboriginal title in terms of proving or defining the right, the test for justifying the infringement of 'existing' Aboriginal title is drawn from the jurisprudence on these other Aboriginal rights. See *Delgamuukw*, *supra* note 112 at para. 160-70.

[243] The *Van der Peet* trilogy consisted of three cases on Aboriginal fishing rights that were handed down on the same day, including *R v. Van der Peet* [1996] 4 C.N.L.R. 177 (S.C.C.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; and *R. v. N.T.C. Smokehouse*, [1996] 4 C.N.L.R. 130.

[244] See *R. v. Oakes*, [1986] 1 S.C.R. 103.

> This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.[250]

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[245] *Sparrow, supra* note 129 at para 70.

[246] *Ibid.*

[247] *Ibid.*

[248] *Ibid.*

[249] *Ibid.*

The final query is then, whether the interference with the right is consistent with "the honour of the Crown."[251]

In *Delgamuukw*, the proposed justification test has similar steps, the first being that "the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial."[252] This aspect of the test is supposed to examine the objective of the legislation in the context of "the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown."[253] This is supposed to take into consideration the goal of reconciliation. As Lamer C.J. wrote in *Gladstone,* then quoted in *Delgamuukw*:

> Because ... distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. [Emphasis added; "equally" emphasized in original.][254]

The inquiry this thus seems to be whether the legislative objective balances the

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[250] *Ibid* at para 71.

[251] *Ibid* at para 74.

[252] *Delgamuukw, supra* note 112 at para 161.

[253] *Gladstone*, *supra* note 244 at para 72.

[254] *Gladstone, supra* note 244 at para 73, Cited in *Delgamuukw*, *supra* note 112 at para 161.

rights of the Aboriginal communities with the needs of the broader political community.

The second inquiry, according to Lamer C.J in *Delgamuukw*, is "whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples."[255] This second part of the test should focus on whether the Crown has discharged its obligation to represent aboriginal peoples' interests, placing them, theoretically, before the Crown's interest. As then Chief Justice Lamer explains: "[t]he theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first."[256] This however does not necessitate that Aboriginal title must always have priority. Lamer, C.J. writes:

> The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take -- will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.[257]

Lamer, C.J. further explains these aspects of the second stage of the test by commenting that the first consideration mentioned in the passage above–the right to exclusive occupation–may, for example, only necessitate that the Crown show

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[255] *Delgamuukw*, *supra* note 112 at para 162.

[256] *Ibid.*

"both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest' of the holders of aboriginal title."[258] As for the second consideration mentioned in the passage above–the right to choose what use the land is put to–this factor may only force the Crown to be required to consult with Aboriginal peoples, and "may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands."[259] The final consideration–the economic impact–leads the Court to muse that:

> The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.[260]

Seemingly, the result of s. 35, in the context of Aboriginal title, is that if it survived past April 17th 1982, the Crown must meet the burden of satisfying a justification test in order to extinguish Aboriginal title. As such there is a conflation of some of the Aboriginal rights jurisprudence and Aboriginal title jurisprudence, if not in regard to proving the existence of Aboriginal title, but in

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[257] *Ibid* at para 166.

[258] *Ibid* at para 167.

[259] *Ibid* at para 168.

[260] *Ibid* at para 169.

relating to justifying the infringement of Aboriginal title.

V. Conclusion: The Kent McNeil thesis and the importance of discretion in the *Chippewas* case

As we discovered in chapter two, the Superior Court uses the equitable doctrine of *bona fide* purchaser to justify the creation of a 60-year equitable limitation period that barred the Chippewas from the remedy of possession; this despite the legal nature of *sui generis* Aboriginal title. In this way, the Superior Court avoids finding that a patent is void *ab initio* which, in the absence of a limitation period, or the doctrine of adverse possession, would usually be the prior interest taking precedence. This is justified first through the allegation that with the fusion of law and equity, the "technical distinction"[261] between legal and equitable interests is no longer relevant. Thus contrary to the usual rules that an equitable doctrine cannot function to bar a legal interest, the Superior Court applies an equitable bar in the *Chippewas* case. This approach towards law and equity is called the "fusion fallacy", whereby the Courts assume that because they can apply both legal and equitable rules that there should be no doctrinal separation between them, and is heavily criticised.[262]

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[261] *Chippewas* (S.C.J.), *supra* note 1 at para 738.

[262] See P.V. Baker,"The Future of Equity" (1977) 93 L.Q. Rev. 529; K. Barker, "Equitable Title and Common Law Conversion: The Limits of Fusionist Ideal" (1998) 6 Restitution Law Review 150; A.B.L. Phang, "Common Mistake in English Law: The Proposed Merger of Common Law and Equity" (1989) 9 Legal Studies 291; and S. Chesterman, "Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law' " (1997) 24 Journal of Law and Society 350.

The Superior Court also justified the application of a 60-year equitable limitation period through an analysis of equitable limitations, justification and reconciliation borrowed from the *Sparrow* and *Delgamuukw* decisions. Justice Campbell reasons that, despite the lack of direct relevancy to the claim, due to the lack of any reviewable Crown action after 1982, the Court should not make an order that extinguishes Aboriginal rights without themselves following the guidelines for justification and reconciliation. Justice Campbell writes:

> The defendants however seek an order from this court that extinguishes aboriginal and treaty rights to-day on the basis of traditional property principles that pre-dated the Charter. It is today, in the post-Charter era, that the court is asked to extinguish aboriginal and treaty rights by the application of traditional property doctrines. Such doctrines should be measured against the contemporary tests of justification and reconciliation developed by the Supreme Court of Canada. In the application of property laws that purport to extinguish aboriginal and treaty rights the courts have always given the benefit of the doubt to aboriginal claimants. The modern way to do that here is to test the good faith purchaser defence and the sixty year equitable limitation... against contemporary doctrines of justification and reconciliation.[263]

As such, he applies the *Sparrow* test, and determines that, in the interest of dynamic security, applying the defence of *bona fide* purchaser is thus justified.

We concluded in chapter three that the Court of Appeal relies also on the conflation of legal and equitable principles, as well as the insistence on the discretionary nature of public law remedies to refuse the Chippewas a remedy. Indeed, the Court writes that Aboriginal title should not be immune from equity. The Court explains that Aboriginal title

> has been influenced and shaped by equitable principles... It is difficult to

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[263] *Chippewas* (S.C.J.), *supra* note 1 para 745.

> see why a right having these characteristics and drawing heavily upon the principles of equity for its shape and definition should be entirely immune from the principles of equity from a remedial perspective."[264]

This approach, according to James Reynolds, demonstrates that "the Court has fallen into the trap of the fusion fallacy, i.e., the belief that, because one Court can administer concurrently all rules of equity and the common law, there is no longer any distinction between the two."[265] The Court also bolsters their conclusion that the historical manifestation of the remedy sought, the writ of *Scire facias,* and indeed the entire realm of public law remedies are discretionary in nature.[266] Also, the Court cites the *sui generis* nature of Aboriginal title to defend this use of discretion to support the allegation that the Court need not confine themselves to applying traditional legal rules in a dogmatic fashion.

While both Courts in the *Chippewas* case used slightly different approaches, both relied on the Court having the discretion to grant or deny a remedy based upon factors such as 'reconciliation.' This has prompted Kent McNeil to argue that the *Chippewas* case indeed creates a new method to extinguish Aboriginal title–through judicial discretion.[267] He argues that

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[264] *Ibid* at para 287-88.

[265] J. Reynolds, "Aboriginal Title: The Chippewas of Sarnia" (2002) 81 Can. Bar Rev. 97 at 104. See also *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, where Justice Lambert writes: "My understanding of the effect of the fusion of law and equity is not simply that both systems are administered together by a single structure of courts, but that common law remedies may be awarded for what were purely equitable wrongs, and vice versa, and, in addition, that remedies which have aspects of both systems may be awarded for wrongs that have aspects of both systems." See also, *Canson Enterprises Ltd. v. Boughton & Co* [1991] 3 S.C.R. 534, for another example of the Supreme Court fusing legal and equitable principles.

> [a]ccording to the Ontario Court of Appeal's decision...[d]espite the absence of both a valid surrender and a legislative extinguishment, the Court held that present-day judicial discretion can be exercised in appropriate circumstances to deny a remedy to Aboriginal title holders whose lands were wrongfully taken in the past. This looks very much like a new form of extinguishment by judicial pronouncement.[268]

Indeed, even the Supreme Court seems fairly comfortable with this possibility as the *Chippewas* case appeal, and a petition for rehearing to was refused by the Supreme Court. While it would be rather interesting to gaze into the crystal ball at the effects of this potentially new method of extinguishment, for the purposes of this thesis, the important conclusion is that there is indeed a large amount of judicial freedom to consider many factors, especially in relation to granting a remedy. The balance of this thesis will thus explore this decision from the perspective of a Kahn's cultural study of law in order to explore what social, cultural, or ideological factors may have influenced this use of discretion.

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[266] See *Chippewas* (C.A.), *supra* note 1 at para 250-261.

[267] See McNeil, *supra* note 8.

[268] *Ibid* at 344.

Chapter 5: The "Indian"

I. Introduction

We saw in chapter four that the decisions in the *Chippewas* case were predicated on the ability of the Courts the exercise a broad discretion in the granting, or indeed, the denying of remedies. While the *Chippewas* case has been criticized for demonstrating the creativity a Court can display in trying to deny Aboriginal claims at the expense of doctrinal consistency,[269] interesting questions still remain. The foremost of these is what factors contribute to the hesitancy the Courts seem to possess in this case over the potential of rewarding an Aboriginal claim as against *bona fide* purchasers. As Kent McNeil has observed, "the Court of Appeal's decision indicates that, regardless of the legal validity of their claims, judges will not necessarily allow those claims to prevail if they conflict with the claims of other Canadians who did not participate in and were not aware of the wrongs that were committed."[270] Indeed, McNeil concludes that "[t]he interests of the current possessors of the disputed lands prevailed entirely over the rights of the Chippewas, to the detriment of the legal system generally"[271] by modifying age-old property law doctrines. This result however was not the only possibility on the horizon of potential solutions, as the Court did not give credence to the

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[269] McNeil, *supra* note 8 at 344.

[270] *Ibid.*

[271] *Ibid.*

Chippewas' "willingness...to compromise by not asking for possession or damages against most of the possessors...[or] their desire to seek reconciliation through negotiation."[272]

The creativity which the Court invests into denying the Chippewas' claim prompts the conclusion that there is possibly something connected to our social order which makes us reluctant to reward this particular Aboriginal claim. This thesis, rather than accepting that the product of law is an inevitable result, will instead undertake to understand the "social construction of reality as given, in order to explore the conceptual and historical conditions of these constructions."[273] It will be recalled in chapter one that legal results are the product of active social choices. As Kahn writes:

> Understanding the constructed character of the rule of law allows us to see its contingent character and to understand that law's claim upon us is not a product of law's truth but our own imagination–our imagining its meanings and our failure to imagine alternatives. We can understand that other societies have constructed the character of the political community and the meaning of political events in different ways and that even in our own society a constant battle is fought over terms of this construction. We can clarify the tensions among the possibilities that we confront and see how each makes a world for itself that cannot be subsumed within others. Even if we try to move in one direction rather than another, we cannot resolve the tensions. There is no original foundation from which we can begin a project of free construction, unbounded by a past that establishes the conditions of our own understanding. What we instead discover is that freedom is itself a contested term and that each form of political perception makes a claim to the truth of freedom.[274]

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[272] *Ibid.*

[273] Kahn, *supra* note 14 at 39.

[274] *Ibid.*

This chapter will thus explore elements of the social order, focussing particularly on First Nation peoples' connection to it, that contribute to the conceptual conditions from which the unwillingness to reward the Chippewas' claim emerges. This investigation will begin with an exploration of the "conceptual and historical conditions"[275] which precipitate it.

This chapter must begin by a general exploration of Euro-Indian relations. Kahn writes, that the "cultural discipline of law...starts with a description of the shape of time and space under the rule of law."[276] As Kahn writes:

> A study of law's rule as a cultural practice can proceed at various levels of generality. A plan of inquiry should, however, begin at the most general, moving to the specific only as the general terrain of the conceptual order of legal practice and belief is filled in. We need to investigate the shape of legal space and time generally before we inquire into particular kinds of space and time–for example, the municipal border or the operation of stare decisis. An inquiry into the general conceptual features is not, however, an abstract inquiry. The inquiry must stay bound to particular examples of the social practice because there is no practice apart from particular acts and events. Generalizations may appear within the practice, but are not first principles from which legal meanings are deductively derived. The inquiry may pose general questions such as "who is the subject of legal obligations?" but its answer must examine the multiple conceptions of the subject that operate in legal practice.[277]

This description, in relation to the *Chippewas* case must attempt to survey, within the length restrictions of this project, the landscape of European-Aboriginal relations, both political and legal, throughout the period of time that is relevant to the case to provide this broad conceptual background. As such, this chapter will begin with an attempt at a manageable exploration of the political and legal relationship between Indigenous peoples in eastern Canada and the European powers settling the area in order to "trace the history of concepts...and map the present structure of belief"[278] that influence modern judicial reactions to Aboriginal claims.

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[275] *Ibid.*

[276] *Ibid* at 41.

I will then turn to the *Chippewas* case itself to explore the Superior Court, and the Court of Appeal's perception of the Indian to detect what aspects of the social order particularly emerge as problematic in the case. More particularly, I will explore how both Courts perceive the Chippewa Indians, and how this perception interacts with each Court's understanding of the social. Through this analysis the reasons connected to our social understanding of the Indian– structural, architectural, genealogical, historical, or legal– which makes the Court hesitant to reward the Chippewas' claim to possession of the land may be excavated from the bedrock of our social understandings.

II. Historical survey of Euro-Indigenous relations

Prior to contact with Europeans, the documented history of Aboriginal groups in Canada is fairly sparse. This lack of record-keeping in the European manner contributed to the Europeans' understanding of the Indian as a peoples with no past, no culture, and no relevant history. Oral histories have been passed down throughout the ages in Aboriginal culture, but were not recognized as valid

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[277] *Ibid* at 37.

[278] *Ibid* at 41.

historical sources, and consequently were compromised as a result of the policy of assimilation adopted by the British in the 19th and 20th Centuries. While the lack of records makes it difficult to reconstruct the history of Aboriginal groups such as the Chippewa, anthropology and archaeology can give us some insight on the history of these groups. The occupation of land in the territory known as southern Ontario is a matter of debate:

> some anthropologists have concluded that before the arrival of Europeans, the northern Ojibwa lived on the northern shores of lake Huron and Superior and moved into the lands of the Canadian shield during the early eighteenth century to take part in the fur trade and to avoid raiding bands of Iroquois. Others have argued that the Ojibwa have always occupied these northern lands and the earlier conclusions were the result of a confusion over band names. The Ojibwa themselves explain that they once lived on the Atlantic coast and moved gradually westward over an unknown length of time. There may never be sufficient evidence to prove or disprove these statements.[279]

Thus, prior to European contact, there is little information about the history of the Ojibwa.

When European powers began to struggle over territory in the new world, there begins to be some mention of the First Nation peoples in the historical record. Before the creation of British North America in 1867, the First Nations peoples of southern Ontario played an important role in the power struggle between the English and the French. While both the French and the English periodically claimed the new world as their own,[280] the European powers "could do no more than make symbolic claims to sovereignty."[281] The friendship and allegiance of the Aboriginal groups were essential to the victory of one colonial power over the other in the new world. The Ojibwa were not easy friends for the English to make, however. The French had a longer relationship with the Ojibwa, and understood their ways. The French had learned that through the provision of "liberal presents, cheaper trade goods, the promise of abundant plunder,"[282] they could maintain the Ojibwa as allies. The Ojibwa also had ties through intermarriage that secured their friendship.[283] The English however resisted the giving of presents to secure alliances as there was the feeling that there was something distasteful about having to purchase allegiances. Jeffrey Amherst, Commander-in-Chief of the British troops in America in 1758-1763, for example, once wrote that "Service must be rewarded; it has ever been a maxim with me. But as to purchasing the good behaviour either of Indian or any others, [that] is what I do not understand."[284]

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[279] D.J. Bercuson et al., *Colonies: Canada to 1867* (Toronto: McGraw-Hill Ryerson Limited) at 101.

[280] See *Ibid* at 55 for an example of one of the many imperial claims to

Possibly the misunderstanding contributing to ideas like Jeffrey Amherst's was the recognition that while the Ojibwa could be counted as friends, they were allies not subjects. As Schmalz writes:

> [t]he Ojibwa demonstrated that their alliances with the French was in no

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title in North America.

[281] *Ibid* at 96.

[282] P.S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991) at 50.

[283] *Ibid*

[284] Quoted in Schmalz, *ibid* at 64.

> way carved in stone. It could shift and at brief times did, to the English. Their diplomacy was focussed on retaining their middleman position in the fur trade, between two European powers and native groups to the north and southwest of southern Ontario.[285]

This account of First Nations as independent self-governing groups interested in their own well-being is adopted by the accounts of Sir William Johnson, who was the first appointed in 1774 to the position of Indian Agent. He wrote that openly treating Aboriginal groups as inferior in status would be dangerous. As Chamberlin writes, "Johnson knew that any misrepresentation of the Aboriginal peoples as subaltern was both very dubious and dangerous. Call the Indians subjects, he warned, and you had better have an army behind you."[286] The Ojibwa, and other Aboriginal groups, were thus not simply a conquered peoples, but an independent sovereign peoples.

The statement that the First Nations were sovereign peoples however, requires some discussion about what this oft-used term can connote. Chamberlin defines sovereignty in two distinct ways. First he defines it as the "underwriting political and constitutional power."[287] He explains First Nation's sovereignty in the following way:

> [i]n the case of the Americas, this power was historically realized by both European and Aboriginal nations in the circumstances of contact, including contact before Columbus between Aboriginal nations, and

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[285] *Ibid* at 36.

[286] J.E. Chamberlin, "Culture and Anarchy in Indian Country" in M. Asch ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 3 at 20.

[287] *Ibid* at 12.

> between them and the African, Asian, and European travellers who came across the oceans in the preceding millennia. It was then qualified after European settlement by peace treaties and land cession agreements.[288]

Chamberlin also however proposes a second definition of sovereignty. This definition is cultural sovereignty that he defines "as the inviable expression of a people's collective identity, transcending the particulars of time and place and the irrelevant polemic of treaties."[289]

The First Nations of Canada were sovereign in both senses before the victory of the English over the French, and indeed continued to assert their sovereignty even when the English had clearly defeated the French. The Ojibwa did not accept that the English victory over the French constituted a victory over them. The Ojibwa chief Minivana was quoted as saying:

> Englishman, although you have conquered the French you have not conquered us! We are not your slaves. The lakes, these woods, and mountains were left to us by our ancestors. They are our inheritance, and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread, and pork and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.
>
> Englishman, our Father, the king of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied in either of two ways; the first is the spilling of the blood of the nation by which they fell; the other, by covering the bodies of the dead, and thus allaying the resentment of their relations. This is done by making presents.
>
> Englishman, your king has never sent us presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does

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[288] *Ibid.*

[289] *Ibid.*

> these things, we must consider that we have no other father or friend among the white man, than the king of France [290]

As Borrows notes, this passage reflects a "government to government relationship"[291] with the pertinent colonial powers. This inter-governmental relationship was made even more necessary with the breakout of the Pontiac Uprising in 1763 precipitated by discontent with the British after their victory over the French– sometimes also called the Beaver war.[292] Pacifying the First Nations became more important to keep peace in the colonies. This conflict proved that despite the English victory, the First Nations could still assert "their sovereignty to uphold the official diplomatic structure of their relationship."[293]

In 1763, the *Royal Proclamation* was declared, fundamentally changing the nature of the relationship between the Indigenous peoples and the Crown. While some scholars now argue that the *Royal Proclamation* actually represents part of a treaty guaranteeing Aboriginal self-government,[294] according to traditional legal interpretation of the *Royal Proclamation* had the effect of changing First Nations from a politically sovereign peoples into a peoples subordinated to the British Crown. As Harring explains, this indeed was the motivation behind legal instruments such as the *Royal Proclamation*. He writes:

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[290] Chief Minivana found in J. Borrows, "Wampum at Niagara: The *Royal Proclamation*, Canadian Legal History, and Self-Government" in M. Asch ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 157.

[291] *Ibid* at 158.

[292] See Schmalz, *supra* note 283 at 63. Chapter 4 of this book also contains a very good description of the Ojibwa of southern Ontario's role in the war.

[293] *Ibid* at 158.

> This law centred policy as it pertained to native people has two purposes: first, to avoid unnecessary colonial wars by protecting indigenous people from uncontrolled usurpation of their lands by local colonists; and second, to re-socialize indigenous people so as to accommodate them to the new colonial order. Law, an instrument of social control, took an equal place with education and religion in the acculturation of indigenous people.[295]

Thus, while the *Royal Proclamation* did have the effect of protecting the land the First Nations held from "great frauds and abuses" by private individuals in the purchasing of their lands, it gave them protection in the form of "ethnocentric paternalism"[296] which sought to replace First Nations way of life with the colonial standard. Thus, while John Borrows has argued that the *Royal Proclamation* became a treaty through the signing of the Treaty of Niagara,[297] it had the effect of subsuming one power under the other. The Aboriginals became the "nations with whom we are connected, and who live under our protection."[298] This, as Borrows writes, equates "Aboriginal sovereignty and subordination."[299]

The subordination of the Indian in the *Royal Proclamation* marks the

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[294] See Borrows, *supra* note 288.

[295] S.L. Harring, *White Man's Law: Native Peoples in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998) at 18.

[296] *Ibid.*

[297] See Borrows, *supra* note 291.

[298] *Ibid* at 161.

[299] *Ibid.*

creation of a new perception of Indian. The Indian is transformed from a politically sovereign entity into an entity lacking the ability to represent their own interests–especially legally in relation to land. For example, in the case of *Mutchmore v. Davis,*[300] the Court of Chancery heard a bill to impeach the so-called Tiffany patent. One of the grounds alleged was that part of the land in question was un-surrendered Indian land. Justice V.C. Spragge summarily dismissed Aboriginal land issue by stating that

> these lands were dealt with by the Crown in the way it was considered most for the benefit of the Indian, for and towards whom it assumed the duty of trustee and guardian. For aught that appears it may have been a wise and a most reasonable discharge of this duty; it may have been at the instance, or with the consent of, the Chiefs of the Six Nations Indians, that this grant was made to Tiffany in consideration of his erecting mills, the want of which may have been a serious inconvenience to the Indians; or the erection of which may have added largely to the value of their adjacent lands.[301]

The Indian thus becomes the ward of the state needing initially to be protected, then civilized, and finally assimilated.[302]

While extinguishing the political sovereignty of the First Nations had been achieved by the *Royal Proclamation*, the pressures put on the First Nations by settlement had also compromised the cultural sovereignty of First Nations. As Robert Surtees writes, the Ojibwa, for example, had been weakened as a result of war, disease, and drink. In addition, American land treaties with the Aboriginals residing in the American territories had cut off contact between tribes that had previously been allied. Further factionalisation occurred in southern Ontario due to land settlement that pushed tribes further away from traditional meeting places.[303] All of these factors contributed to the loss of both cultural sovereignty, and political sovereignty.[304]

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[300] (1868), 14 Gr. 346 (Ont.Ch.).

[301] *Ibid* at para 8.

[302] See J.L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in I.A.L. Getty & A.S.Lussier eds. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*

The loss of cultural sovereignty contributed to the relative ease of the land cessions in the Upper Canada regions. Because of the weakened state of the Aboriginals in Upper Canada, including the Chippewas, land cession was relatively quick and uncomplicated. Vast tracts of land were acquired by treaty. Surtees describes the dominant character of these land cessations in the following way:

> The meetings were brief, the demands were minimal; and the government agents appear to have anticipated no trouble as they prepared for the formal surrender councils. And they received none. The picture one receives from these arrangements is one of a demoralized, even docile, race of people submitting to the will of government. The land cessations, taken so easily, without any form–or fear–of substantial resistance, add a dimension to the story of the advent of the reserve policy in Upper Canada.[305]

The land cessations in Upper Canada thus suggest that a radical shift in both the

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(Vancouver: UBC Press, 1983) at 30.

[303] See R.J. Surtees, "Indian Land Cessions in Upper Canada, 1815-1830" in I.A.L. Getty & A.S.Lussier eds. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 65.

[304] See also Schmalz, *supra* note 282 for a description of the process of Ojibwa land cession from a more historical perspective.

reality of, and the perception of the Indian. A once fierce and independent peoples had become fractured and demoralized.

This loss of cultural sovereignty thus helped to create the perception of the Indian as not only politically subordinate, but also culturally inferior. This is not to say, however, that the British humanitarians did not have good intentions towards the Indian within the restrictions of their own constructed social world. While organizations such as the Aborigines' Protection Society[306] were concerned about the survival of the Indian, their answer to the problem of Aborigine survival was to civilize the Indian by teaching them how to fit within the new order being imposed upon them. This may however, as Surtees notes, have seemed like the only humane option in the face of the Aboriginal loss of cultural strength. He argues that the land cessions between 1815 and 1830 "served as an indication that the native peoples had lost their confidence in survival. In such circumstances, the presentation of an alternative lifestyle, it was felt, would be gratefully, even

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[305] Surtees, *supra* note 304 at 80.

[306] This organization, founded in England in 1838, purpose was to monitor the plight of Indigenous peoples in North America in order to potentially improve their situation. See N. McMahon's brief explanation of this organization online: <http://collections.ic.gc.ca/portraits/docs/imm/ea024868.htm> date accessed: May 13th 2004. See Aborigines Protection Society, *Canada West and the Hudson's-Bay Company a political and humane question of vital importance to the honour of Great Britain, to the prosperity of Canada and to the existence of the native tribes : being an address to the Right Honourable Henry Labourchere, Her Majesty's principal secretary of state for the colonies* (London: Aborigines Protection Society, 1856) for a discussion of the society's actions in what was to become Canada.

eagerly embraced."[307] Thus the Indian became the child of the Crown, to be taught the ways of the European. An excellent example of the British view of the Indian is expressed Sir John G. Bourinot's history of Canada under British rule, published in 1901. He writes:

> [a]s soon as the North-west became a part of the Dominion, the Canadian government recognised the necessity of making satisfactory arrangements with the Indian tribes. The policy first laid down in the proclamation of 1763 was faithfully carried out in this region. Between 1871 and 1877 seven treaties were made by the Canadian government with the Crees, Chippewas, Salteaux, Ojibways, Blackfeet, Bloods and Piegans who received certain reserve land, annual payments of money and other benefits, as compensation for making over to Canada their title to the vast country where they had been so long the masters. From that day to this the Indians have become the wards of the government, who have always treated them with every consideration. The Indians live on reserves allotted to them in certain districts where schools of various classes have boon provided for their instruction. They are systematically taught farming and other industrial pursuits; agents and instructors visit the reserves from time to time to see that the interests of the Indians are protected; and the sale of spirits is especially forbidden in the territories chiefly with the view of guarding the Indians from such baneful influences. The policy of the government for the past thirty years has been on the whole most satisfactory from every point of view. In the course of a few decades the Indians of the Prairies will be an agricultural population, able to support themselves.[308]

The Canadian government had thus taken upon themselves the obligations to acculturate the First Nations, and prepare them for life in the new British order. The First Nations would then simply melt into the population. Government obligations would then end, as there would be no tribe existing to owe any obligations to.

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[307] Surtees, *supra* note 304 at 81.

[308] Sir. J.G. Bourinot, *Canada Under British Rule, 1760-1900* (Toronto:

While the expectation was that the Indian was a dying breed, the First Nations of Canada were far more culturally resilient than the government would have ever imagined. Many unsuccessful attempts were made to enfranchise the Indian, which ultimately only estranged Aboriginal groups from the Indian administration.[309] The privatisation of land was a central conflict in many of these attempts at civilizing the Indian. The *Gradual Civilization Act,*[310] of 1856, for example, instituted a system for Indian enfranchisement. This act provided that "any Indian...adjudged by a special board of examiners to be educated, free from debt, and of good moral character could on application be awarded twenty hectares of land..."[311] As a consequence the Indian would cut all ties to the tribe, and gain the privileges of enfranchisement. These privileges included equal political participation, and undiscriminatory application of laws. The rationale of this bill was founded in a strict belief in the educative function of property.[312] It was "only when Indians were brought into contact with individualized property"

The Copp, Clark Company, 1901) at 238-239

[309] See J.S. Milloy, "The Early Indian Acts: Development Strategy and Constitutional Change" in I.A.L. Getty & A.S.Lussier eds. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 56

[310] *Statutes of Canada*, 20 Vict., c. 26, 10 June 1857 [hereinafter *Gradual Civilization Act*].

[311] Milloy, *supra* note 310 at 58.

[312] See C. Rose, "Property as a Keystone Right" (1996) 71 *Notre Dame L. Rev*. 330, in which Carol Rose argues that in American society today the educative function of property is still the most important reason for the zealous protection of individual property rights.

that "full civilization of the tribes could be achieved."[313] Private property, it was thought, "would create industriousness in the breast of the properly educated and thereafter increasingly self-reliant native farmer."[314] In result, however, the attempts were generally a failure. Under the *Gradual Civilization Act* only a few Indians applied, and one Indian was enfranchised.[315] The Indian would accept the "revitalisation of their traditional culture within an agricultural context", but not the "total abandonment of their culture."[316]

Prime Minister Pierre Trudeau's *White Paper*[317] of 1969 was one of the first modern attempts to fundamentally change the nature of the treatment of Aboriginals in Canada. The *White Paper* proposed the end of the "discriminatory legislation" that kept the Indian as "someone apart." How this was to be carried out was not fully clear, only that "negotiations would be carried on with the provincial bodies, regional groups and the bands themselves." In exchange for enfranchisement, there would begin a process to dismantle the treaty system. The *White Paper* envisioned an "equitable" end to treaty rights, and the full enfranchisement of the Indian into society through the following acts

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[313] Milloy, *supra* note 310 at 58.

[314] *Ibid.*

[315] *Ibid* at 61.

[316] *Ibid* at 60.

[317] Canada, Dept. of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian policy, 1969 / presented to the first session of the twenty-eighth Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development* (Ottawa: Queen's Printer,

> 1) repeal the Indian Act and pass legislation necessary for Indians to control Indian lands and acquire title to them; 2) propose to the provinces that they consider Indians to be provincial citizens so that they would receive the same services through the same channels as other provincial citizens; 3) make available "substantial funds" for Indian economic development; 4) phase out the Indian Affairs Branch of the Department of Indian and Northern Affairs; 5) appoint a commissioner for the adjudication of land claims.[318]

Aboriginal groups, however "saw not so much an end to segregation," Bruce Clark writes, but "an end to liberty."[319] The *White Paper* signalled to the Canadian government that the First Nations of Canada would not eventually melt away like snow in the spring. Aboriginals were a continuing reality on the Canadian landscape and could not be ignored.[320]

The most recent legislative attempts to manage the continuing existence of First Nations in Canada has been through the enactment of the *First Nations Land Management Act*[321] and the more controversial proposed *First Nations*

1969) [hereinafter the *White Paper*].

[318] T. Wotherspoon & Vic Satzewich, *First Nations: Race Class and Gender Relations* (Regina: Canadian Plains Research Center, 2000) at 230.

[319] B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 159.

[320] See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: Oxford UP, 1992) for a discussion of the effects of the *White Paper*. This was an important part Aboriginal history, for as Dickason explains, while it was ultimately retracted on March 17th 1971 it had some other political and social implications.

[321] R.S.C. 1999, c.24. [hereinafter the *First Nations Land Management Act*] This Act was declared in force in 1999.

Governance Act.[322] The stated goal of the former Act was to create an optional alternative regime for band landholding for bands who wished to escape the *Indian Act* provisions.[323] The Act allows bands to design, implement and enforce their own land codes within certain parameters such as the requirement to have rules that require a matrimonial property regime, and the continuation of third party interests. Also, the Act places limitations on the alienation of land, such that land may not be exchanged except for other land. While the *First Nations Land Management Act* was the final legislative step to implementing the Framework Agreement[324] created through "an extensive consultation process with the 14 signatory First Nations and the Assembly of First Nations and more than two years of consultation with non-Aboriginal parties;"[325] the Governance initiative was not supported by such a cooperative effort. As such the *First Nations Governance Act* has been controversial. This bill attempted to create a framework for the establishment of democratic First Nations self-governance, but has been criticized by Chief Roberta Jamieson as the "prescription of more colonialism"[326] by imposing legislative solutions rather than working with Aboriginal communities to "address the unacceptable results of colonialism."[327] The general problem is that despite the potentially good hearted attempt to afford First Nations more control over their own destiny, there is still discontent with the perceived imposition of governmental will rather that collaboration and consultation.

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[322] Bill C-71, 2002 [hereinafter the *First Nations Governance Act*].

[323] See Canada, Indian and Northern Affairs Canada, "*First Nations Land Management Act*" Online <http://www.ainc-inac.gc.ca/pr/pub/matr/fnl_e.html> Date accessed March 25th, 2004.

[324] See the "Framework Agreement on the *First Nations Land Management Act*",Online <http://www.fafnlm.com/LAB.NSF/39e36a26f6235821852568c3005dc7af/c367db5e6523f58b852568e7006ed01b?OpenDocument> Date accessed March 25th, 2004.

[325] "*First Nations Land Management Act (FNLMA)*: General Background" First Nations Land Management Agreement website Online <http://www.fafnlm.com/LAB.NSF/vSysSiteDoc/Press+Releases?OpenDocument>

The above, admittedly brief, survey of the relationship between Aboriginal peoples and the European colonizers through a broad historical perspective demonstrates several interesting intellectual possibilities with regard to the world of social meaning and its relation to the Indian. The simple yet important understanding is that the Indian has played many different roles in Canadian history. The Ojibwa were so fierce a peoples their allegiance was considered essential in maintaining British colonial interests in the territory. They also at points were the emaciated, ragged peoples struggling to adapt to a violent cultural upheaval. Another important understanding is that as increased settlement simultaneously began to affect both the lifestyles of First Nation peoples, and decrease the importance of Indian allegiance, the relationship between First Nations and the British Crown changed from a relationship between two sovereign peoples, to the subordination of Aboriginal sovereignty to the Crown.

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[326] R. Jamieson, "What do you mean 'we', white man?" in *The Globe and Mail*, Monday May 26, 2003, A11.

This is what Borrows describes as the unilateral and unlawful "assertion of sovereignty, which deprives Aboriginal nations of underlying title and overriding self-government."[328] This is an assertion which still lingers, even in light of the most recent attempts to resolve the tension through federal legislation such as the *First Nations Land Management Act* and the failed *First Nations Governance Act.* As W.P. Kinsella's novel *Born Indian* reflects so poignantly, Aboriginal peoples do not exactly trust the Crown. As Ballard Longbow's joke goes "Trusting the government is like asking Colonel Sanders to babysit your chickens."[329]

As Indigenous peoples such as the Ojibwa decreased in importance, and were no longer necessary, the colonizers began to want to make them more like themselves. As the Ojibwa were no longer superior or equal in military importance, the British began to desire the enculturation of indigenous peoples. This impulse, while motivated potentially by good will, still manifested a cultural arrogance and superiority. European colonizers at this moment in history began to try to civilize the Indian so as to help them adjust to the new and inevitable world order they brought with them. The granting of private property in the form

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[327] *Ibid.*

[328] J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 117. See chapter 5 entitled "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism." for a discussion of illegality of the Crown's unilateral assertion of sovereignty in Canada. For a discussion of this same issue in relation to Aboriginal jurisprudence see P. Fitzpatrick, "'No Higher Duty': *Mabo* and the Failure of Legal Foundation" (2000) 13 Law and Critique 233.

[329] W.P. Kinsella, *Born Indian* (Ottawa: Oberon Press, 1981) at 39.

of land was curiously one such mechanism believed to further this goal. Thus the acceptance and cultivation of private property seems to be a sufficient condition to be considered enculturated into the new social order.

III. The portrayal of the Indian in the Superior Court judgment

The Cameron transaction was negotiated in the early 19th Century, around the time when the dominant attitude towards the Indian was shifting towards policies of assimilation and civilization. While the policies towards the Indian at this time are ascertainable, there is little mechanism for determining the wishes and desires of the Chippewas in relation to this transaction. This becomes frighteningly clear through examining the attempts of the Superior Court and the Court of Appeal in the *Chippewas* case to construct the Indian. Indeed it is seemingly an exercise in historical imagination as the wishes, desires, will, and opinion of the Indian is dependent on the interpretation of silence–at least in the documented historical record. Unlike *Delgamuukw*, and other Aboriginal cases where oral tradition can be of assistance, no oral history relevant to the transaction in question even survived. In consequence, both Courts were required to interpret what the lack of response, complaint, or indeed any accessible opinion at all, meant. This exercise in interpretation is illustrative of the opinions, beliefs, and preconceptions the Court harbours about Indigenous peoples, and as such can be explored to determine what aspects of their construction of the Indian may influence their hesitance to reward them land.

At the Superior Court level, Justice Campbell attempts to construct the Indian through creating a narrative by which to understand the events, which involved creating a narrative of events from a voluminous and enigmatic record. As Justice Campbell writes:

> There was no *viva voce* evidence. The relevant part of the record consists almost entirely of ancient documents together with the affidavits and cross-examination transcripts of historians, anthropologists, and other experts. This mass of evidence, over three thousand documents, was introduced without any contest about its admissibility or the use that could be made of it. There is no dispute about the documentary evidence. There were a few differences of expert opinion about the ultimate conclusions that should be drawn from the documents, but there are no disputed facts that affect the result of these motions.[330]

From this mass of evidence Justice Campbell creates a narrative punctuated by vivid characterization of the individuals involved. It is populated by swindlers, shady dealers and innocent victims. It is replete with description of government departments rivalling the Dickensian office of Circumlocution in *Little Dorrit*.[331] It is therefore necessary to describe Justice Campbell's portrayal of the "dramatis personae"[332] in order to understand his conception of the "principal actors"[333] which shape and mould his perception of the Chippewas in the case.

While not a major character in the drama of the Cameron transaction, the villagers of Port Sarnia appear as a backdrop informing the political and social climate in the area in the early 19th Century. They are portrayed as a group that exerted constant pressure on the administration of Upper Canada to acquire more land. The pressure for the specific portion of land that becomes the subject of the

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[330] *Chippewas* (S.C.J.), *supra* note 1 at para 11.

[331] C. Dickens, *Little Dorrit* (Ware: Wordsworth Editions, 1996).

[332] *Ibid* at para 41.

Chippewas case indeed began in "February of 1837" when "the villagers submitted a fifty-five signature petition to Bond Head complaining that the government has set aside no land for a town site, that the 'whole frontage of the township of St. Clair is in possession of the Indians' except for a small parcel of unsuitable land."[334] The villagers had an interest in acquiring the Chippewas' land, for apparently it was far more suitable for further town development. Another petition "in February of 1851... signed by 190 residents of Sarnia was sent to Lord Elgin complaining of the difficulty of obtaining the consent of the Indians to opening of the road"[335] through the Chippewas' reserve. Thus, the narrative created by Justice Campbell invokes a scenario that was common to Canadian settlement.[336] The picture evoked is one of land hungry settlers who are unable to access the good land because of the presence of the Indians.

Another body worthy of mentioning is the broader government Administration at the time, which was not in a healthy state. Justice Campbell describes the administration, at the time of the Cameron transaction as in a general state of "chaos, changeover , and confusion."[337] He explains that the administration, "in 1839...assumed there would be a future surrender of the disputed lands. By the mid or late 1840's their successors assumed there had been

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[333] *Ibid* at para 40.

[334] *Ibid* at para 39.

[335] *Ibid* at para 123.

[336] See Surtees, *supra* note 304.

a past surrender."[338] This confusion resulted mainly from the fact that there was an "administrative changing of the guard."[339] As Justice Campbell describes

> In 1839, following Lord Durham's report, a bill for the union of Upper and Lower Canada was introduced into the British Parliament and then withdrawn pending a report from the new Governor General Charles Poulett Thompson, later Lord Sydenham. He arrived in Canada in October of 1839, less than three weeks before Cameron's meeting with Wawanosh and two of the other chiefs, and came to Toronto on November 22 to assume control of the administration from Sir George Arthur, the Lieutenant Governor.
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> We see thus at the time of the Cameron transaction not only a coming upheaval in the deep structure of government but also an administrative changing of the guard. Sir George Arthur, the Lieutenant Governor of Upper Canada who figured so prominently in the Cameron transaction was still nominally in charge. If not a lame duck because of the impending abolition of his office, his authority was suddenly supplanted by Thomson an November 22.[340]

Considering the state of the ruling authority at the time of the transaction, Justice Campbell is not surprised at the Chippewas' ignorance of the Cameron transaction. Indeed, if the administration that was apparently responsible for supervising such transactions was in such turmoil, how could the Chippewas be expected to be informed?

Indeed this muddled state of affairs continued throughout the entire time relevant to the transaction. While the agreement between Wawanosh, the two other chiefs and Cameron was made in 1839, the patent for the land was not

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[337] *Chippewas* (S.C.J.), *supra* note 1 at para 47.

[338] *Ibid* at para 47.

[339] *Ibid* at para 49.

[340] *Ibid* at para 48-49.

granted until 1853. As Justice Campbell notes, "the legal status of the Cameron lands, between November 8, 1839 and August 13, 1853, was unclear. The Crown officials themselves referred to the transaction confusingly, both as a future sale and a concluded sale."[341] The Chippewa band was apparently ignorant of the terms of the transaction, only showing a clear knowledge that by 1851 they realized they no longer owner the land. This fact being made obvious by the settlers that were living on the land already. As Justice Campbell notes however the Chippewa were dependent on the administration to maintain a record of the transactions. He points to evidence given by an oral history expert "that the Chippewa historical tradition operates in a way that would have ensured that the facts of the Cameron transaction were not transmitted to subsequent generations of Sarnia First Nation members and they became completely dependent on government documentary record keepers to know the facts."[342] Justice Campbell thus suggests that the government administration thus played a large role in the ignorance of the Chippewa band, as well as the lack of record of the Chippewas contemporary opinions on the Cameron transaction.

The Indian Administration at the time deserves a special mention, as it plays a particularly important role in the protection of the Indian.[343] An illustrative example of the importance of the Indian Administration as the protector of Aboriginal interests can be seen in the case of *Mutchmore v. Davis*[344], mentioned earlier, where an attempt to impeach a patent was made based partially on the grounds that the land in question was unsurrendered Six Nations land. In this case, decided in 1868, just 13 years after the Cameron transaction, Chancellor VanKoughnet dismisses the allegation that the land was not surrendered by simply assuming that the lands "were dealt with by the Crown in the way it was considered most for the benefit of the Indians, for and towards whom it was assumed the duty of trustee and guardian."[345] As the scenario in this case the Aboriginals involved had no input into the legal determination of their rights to their land. It was simply assumed that the Indian Administration was doing what was in the best interests of the Indians as it was their duty to be a trustee or guardian. The health of the Indian Administration at the time of the Cameron transaction is thus especially important to the determination of whether the Cameron transaction was handled properly. As such, Justice Campbell notes that "the story of the disputed lands can only be understood in terms of the terrible weakness in the administration of the Indian Department of the time."[346]

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[341] *Ibid* at para 218.

[342] *Ibid* at para 211.

[343] *Ibid* at para 607-657. This section of the judgment explores the actual legal capacity of Aboriginals in relation to land from the time of the transaction to the present. This lack of capacity, seems to feed into Justice Campbell's

The Indian Administration sadly also was a rather defunct organization.

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attribution of fault for any wrongdoing to the Indian Administration whose role it was "to protect the reserve from improper encroachment" (at para 46).

[344] *Supra* note 301.

[345] *Ibid* at para 8. Per VanKoughnet, C.

[346] *Chippewas* (S.C.J.), *supra* note 1 at 45.

Justice Campbell portrays the Indian administration at the time of the Cameron transaction as inept and unaccountable. He describes Samuel Peter Jarvis, the Chief Superintendent of Indian Affairs as an inept and bumbling bureaucrat, noting that "he was finally and painfully removed from office in June of 1845 because of mal-administration and his stubborn failure to account properly for Indian funds. It was established that his financial records, including those for the Cameron transaction, were in a mess, probably through mere carelessness and administrative ineptitude."[347] Thus, Justice Campbell finds it less than surprising that no official in the Indian Department noted the lack of formal surrender documents, or even hinted at the illegality of the Cameron transaction because "no one took charge, no one was accountable."[348]

This brings us to the description of one of the key villains in the narrative– Malcolm Cameron. Justice Campbell describes Malcolm Cameron as a

> ...merchant, publisher, land speculator, and politician, [who] came originally from the Ottawa Valley where his picture appears to this day on the masthead of the Perth Courier. His business interests in Sarnia included milling, shipping, timber, and land speculation. An ardent Methodist, he allied himself with Wawanosh and others in the religious rivalries then prevalent. A Reform member of the Upper Canadian assembly from the mid thirties, he remained a member of the legislature after the Union of the Canadas. Mercurial and unpredictable, he joined the cabinet only to resign in 1849 and align himself with the opposition.
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> In the course of his turbulent political career he was back in cabinet in early 1852 where he remained until his defeat in 1854. Often the subject of controversy, he began a libel action in 1854 after Alexander Mackenzie accused him of a shady land deal when he was a member of the previous administration. Cameron won the lawsuit when his former cabinet

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[347] *Ibid* at para 45.

[348] *Ibid* at para 54.

> colleagues foiled Mackenzie by invoking cabinet secrecy. During the 1854 election George Brown accused him of engaging in underhanded land and railway deals. In 1857 he was selling town lots in Sarnia. At the time he finally secured his patent on August 13, 1853 he was chairman of the Land Committee of the Executive Council.[349]

This description suggests that Malcolm Cameron was a very successful businessman, whose reputation for integrity was not unimpeachable. Justice Campbell indeed seems to classify Malcolm Cameron as one of the unscrupulous land spectators from which Aboriginal peoples needed to be protected.

Joseph Wawanosh has a special place in the narrative Justice Campbell presents–the Judas of the tribe. Wawanosh is described as

> autocratic, shrewd, and entrepreneurial. In modern parlance he was a wheeler dealer. It is common ground that we can find in the documents about Wawanosh all manner of good and evil. Mingled with incessant complaints from band members that he was guilty of corruption, unauthorized disposition of communal Chippewa property, and autocratic excesses of authority we find expressions of praise and respect from other band members, probably due to a high degree of factionalism in the Chippewa community at that time. A recovered alcoholic and ardent Methodist he was, together with Chibigun and Corning, the other two chiefs who met with Cameron on November 8, 1839, more assimilated and westernized than the other band members. Deposed by the Crown as official Chief after a government inquiry on March 29, 1844, Wawanosh remained hereditary head chief and was reinstalled as official chief on October 26, 1848.[350]

This passage not only reflects that Justice Campbell thinks that Wawanosh is not to be trusted, but that he did not represent the band's interest. Justice Campbell describes Wawanosh as being "westernized" and thus representing the colonial interest more than the band's interests. This suggestion is made even stronger through Justice Campbell's allegation that Wawanosh and Cameron had a close relationship as friends and business associates. Justice Campbell notes that "Wawanosh was in Cameron's personal debt",[351] which causes Justice Campbell to conclude that the transaction headed by the two must "be subjected to careful scrutiny."[352]

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[349] *Ibid* at para 42-43.

[350] *Ibid* at para 41.

Justice Campbell's perception of Wawanosh as unrepresentative of the band's interests is heightened by the 1843 Wawanosh Inquiry, when the band charged Wawanosh with mismanagement. As Justice Campbell describes, the charges were "general in nature"[353] alleging that Wawanosh was exceeding the boundaries of his authority as chief. Even Joseph Brant Clench, who played various roles in the Indian Administration,[354] noted that Wawanosh was exceeding his power as chief. He wrote:

> I should also beg to suggest that no Head Chief at this or any other time should be allowed to possess authority so unlimited as Wawanosh seems to have assumed. He should not be independent of his tribe but merely the organ of their general wishes to the Superintendent who should be directed to consider him as such and to refuse his sanction to any demands or measures not originating with or sanctioned by the majority.[355]

The Chippewa band themselves echoed these sentiments, reflecting Wawanosh's misrepresentation of the band, in a petition sent to Sydenham in 1841 that alleged

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[351] *Ibid* at para 44.

[352] *Ibid* at para 44.

[353] *Ibid* at para 117.

[354] See note 82 in *Ibid*.

[355] Quoted in *Ibid* at para 116.

"Wawanosh, with the strong assistance of one of the Wise Men who are to make Laws for our guidance, is on his way to your Lordship to prefer requests, against which we strongly protest and to make assertions which are without foundation. We know that he wishes to sell our Lands and drive us from our own Homes."[356] As a result of these allegations Justice Campbell, rather than seeing Wawanosh's views as representing the wishes of the band, sees them as aligning with the wishes of Malcolm Cameron. Wawanosh is not seen as an Indian, but as one from whom the Indians needed to be protected.

While all of the previously mentioned players in the transaction are easily historically visible, the Chippewas are not. Indeed the band's perception of the transaction is remarkably absent. References to the band, and the wishes of the Indians that comprised the band are few and impressionistic. This is a result of the lack of record on the position of the band. Most of the "purported Chippewa perspective on the Cameron transaction"[357] emanates from non-Aboriginal sources. An example of this is a letter written by Peter McGlashan who was a clerk of Magistrate's Court in Sarnia.[358] He wrote a letter in 1847 mentioning the dissatisfaction of the band about not getting paid for the sale of the lands to Cameron to which they had consented. While this letter could be used as evidence to support that the Chippewa consented to the transaction, Justice

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[356] Quoted in *Ibid* at para 117.

[357] *Ibid* at para 120.

[358] *Ibid* at para 120.

Campbell advises caution when interpreting non-Aboriginal sources for Indian intent. He writes:

> This is a convenient place to caution oneself again against over reliance on the recording of Chippewa positions by non-aboriginals who necessarily strain Chippewa assertions through the filter of non-aboriginal language, cultural values, modes of expression, and mindset. McGlashan, a townsperson trying to buy Indian land, was not in a particularly good position to interpret the nuances of Chippewa expression and his reference to consent has little evidentiary weight in determining whether Wawanosh on November 8, 1839 acted with the consent and authority of the band.[359]

The desires of the band however, are very difficult to determine, as no Aboriginal sources surrounding the land transaction are available.

In the face of this paucity of contemporary Aboriginal perspective on this land transaction, Justice Campbell reflects upon the earlier Treaty negotiation process much like similar fact evidence to determine if the Cameron transaction was typical of the Chippewas' approach to the transfer of land. The evidence of other treaties, especially Treaty 29, leads him to the conclusion that the proper consent and consultation had not been obtained, because none of the usual hallmarks existed in relation to the Cameron transaction. In other words, Justice Campbell attempts to determine what the reasonable Indian would have done in the same situation. According to this approach, the reasonable Chippewa Indian would have spent many meetings determining whether or not to sell the land. The reasonable Indian would insist on a formal treaty documenting the Crown's obligations. The reasonable Indian would at least have an awareness of the important details of a transaction affecting their traditional lands.

The reasonable Indian apparently, however, was not present when the Cameron transaction was made. The people present at the transaction were Malcolm Cameron, Joseph Wawanosh, Chibigun, and Corning. Malcolm Cameron had an interest in concluding the transaction as quickly as possible, so he could sell the land. Joseph Wawanosh was "a recovered alcoholic and ardent Methodist he was, together with two other chiefs who met with Cameron on November 8, 1839, more assimilated and westernized than the other band members."[360] This level of westernization, the pecuniary relationship between Cameron and Wawanosh, and the petition to get Wawanosh out of power for abusing his position, all suggest that Wawanosh and the other motivators of the transaction were not likely representing the band's interests. In addition, the Superior Court judgment underlines the fact that the Indian Administration was ill equipped to deal with the intense pressure for land that was being exerted upon the Chippewa by the townspeople.

The Superior Court rendition of the Indian, contemporaneous to the events in question, was as the victim of unscrupulous dealers in a chaotic time. The Chippewas were the innocent victims of an inept bureaucracy and wholly unable to protect their interests. They are thus portrayed as the culturally compromised peoples struggling to maintain their way of life in the face of an imposed system they could neither understand nor negotiate. This type of narrative evokes,

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[359] *Ibid* at para 121.

[360] *Ibid* at para 41.

according to Harring:

> ... the most well-known model of colonial law...that of imposed law. In this model the dominant colonial power imposes its law over acquired lands and peoples through its superior military and police power. Most legal history of indigenous/colonial contact describes this model : at its simplest level indigenous people have their lands taken away by colonial law and are forced to live isolated lives on the margins of the colonial society. This is a miserable legal history of oppression violence, and domination. Indigenous peoples were victims of every kind of legal violence, fraud and theft. They lacked the education and means to use the civil courts to protect their interests.[361]

This is the abysmal form of narrative that Justice Campbell creates–an impossibly difficult system frustrating a naive and helpless Indian.

One can assume that the argument that the Chippewas were innocent victims of a dysfunctional system was intended to curry favour for their cause. This sympathy may however have invoked a response that did not aid their action for the return of the land. The Superior Court's perception of the Chippewa band during the time of the transaction is one reminiscent of the view that provoked people to want to save the Indian by civilizing them in the first place. The broad historical survey at the outset of this chapter suggested that when the colonial government had this perception of Aboriginal peoples they tended towards paternalism–creating government departments to be responsible for the well-being of Aboriginal peoples until they became fully adapted to the new social order. It seems that the maintenance of the cultural difference of Aboriginal peoples evokes a notion of dominance and subjugation reminiscent of that conceived of in feminist theory. This notion is explained by Catherine McKinnon as not a problem of difference, but one of dominance:

> Its underlying story is: on the first day difference was; on the second day, a division was created upon it; on the third day irrational instances of dominance arose. Division may be rational or irrational. Dominance either seems or is justified. Difference is.[362]

The fact that Aboriginal peoples have fought to maintain the things differentiate them from dominant culture, such as maintaining communal property, possibly makes it easier to maintain the assumption that they are somehow inferior, and still need to be enculturated into the dominant order. The Chippewas' desire to upset the current social order by asking for possession of the land possibly confirms that they have not yet fully accepted the importance of things like the importance of dynamic security, or respect for other's property. The consequence of which is that Indigenous peoples were reliant on the beneficence of the Crown to protect their interests as against the rest of settler society. This state of affairs, interestingly, is replicated in the Superior Court judgment. The Chippewas are disallowed from asserting their claim against the *bona fide* purchasers, and are directed to pursue their claims in the way that they have always been–through suing to the Crown for damages.

IV. The portrayal of the Indian in the Court of Appeal judgment

The Court of Appeal constructs the scenario in a wholly different manner from the Superior Court, manifesting a different historical understanding of the

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[361] Harring, *supra* note 296 at 10.

[362] C. A. MacKinnon, "Difference and Dominance: On Sex Discrimination" in Ed. K.T. Bartlett & R. Kennedy, *Feminist Legal Theory:*

Indian. The Court of Appeal paints a picture of a benevolent respectful Crown that was sensitive to the sovereignty of the Indian throughout the time relevant to the transaction. The Court of Appeal describes the dominant character of the relationship between the Crown and First Nations, prior to serious Crown settlement, as the relationship between "between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations."[363] Indeed the Court of Appeal even refers scathingly to other colonial powers' treatment of the Indian, as compared to the beneficence of the British Crown. The Court of Appeal, for example, describes France and Spain's colonisation efforts in the following way:

> In the first half of the 18th century the English Crown showed little interest in the First Nations of North America. Unlike its Catholic counterparts in France and Spain, the English Crown did not pursue active efforts to "civilize" the First Nations peoples and convert them to Christianity. Relationships between the First Nations and English colonies in North America were left primarily to the individual colonies and developed on an *ad hoc* basis.[364]

The Court then suggests that it was a result of this benevolent Crown policy that even after First Nations were no longer needed as allies, the British Crown continued to enforce the protections of land dictated by the *Royal Proclamation* in a manner consistent with their fiduciary duty. Even after the Crown adopted the policy of civilizing, despite the fact that the Indian stood in the way of settlement, the Crown maintained the "desire to control settlement and to protect aboriginal

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Readings in Law and Gender (Boulder: Westview Press, 1991) 81 at 82.

[363] *Chippewas* (C.A.), *supra* note 1 at para 51.

people as the harmful effects of contact with the white man became more obvious."[365] Thus the Court constructs the British Crown as benevolent and interested in protecting First Nations.

The Indian administration, while not portrayed as fully functional, is given far more credit in its ability and desire to protect the Chippewas with regard to the transaction. The Court acknowledges that "[t]he Indian Department underwent many changes between 1750 and 1860. The lines of responsibility and the titles of various officials changed repeatedly. As the bureaucracy grew, responsibility for different aspects of the policy fell to various Crown agencies."[366] Samuel P. Jarvis, acting Chief Superintendent of Indian Affairs in Upper Canada from 1837 to 1845, for example, is described as "honest and well intentioned who had virtually no hands-on experience with the First Nations prior to 1837" who "was an abject failure as an administrator."[367]

Despite this recognition that the Indian Administration was defunct, the Court decides that there is no reason to question the honesty and legitimacy of the nature and substance of the land deal. The Court comes to this conclusion through noting that both William Jones, Resident Superintendent at Port Sarnia, and Jarvis "had reason to doubt Wawanosh's honesty and the reliability of

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[364] *Ibid* at para 48.

[365] *Ibid* at para 68.

[366] *Ibid* at para 51.

[367] *Ibid* at para 91.

statements he purported to make on behalf of the Band."[368] As a result of this distrust of Wawanosh the Court concludes that the Indian Administration would naturally be protecting the interests of the band as the members of the Indian Administration were "far from friendly"[369] with Wawanosh. The Court thus proposes that the Indian administration would have no interest in facilitating the transaction against the band's wishes. The Court writes:

> In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English. In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of those who may have voiced any opposition to Wawanosh's actions.[370]

The Court thus concludes that Jarvis and Jones's distrust of Wawanosh cancels out their ineptitude. The Indian administration was thus, much like in the case of *Mutchmore v. Davis* described above,[371] effectively representing the best interests of the Chippewas.

While Malcolm Cameron is not portrayed as being concerned about the best interests of the Indian, the Court of Appeal displays more sympathy towards the position of Cameron as a businessman. Malcolm Cameron is described by the Court of Appeal "as a businessman, politician and land speculator" who "was a reformer, a Methodist, and a strong proponent of the "civilization" policy."[372] He supported "attempts to secure parts of the Upper Reserve for white settlement, taking the position that the Chippewas could use the proceeds from the sale of parts of their land to finance the development of the rest."[373] The Court reasons that this sale for the purposes of development would have been logical under a policy of civilization: The Court writes:

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[368] *Ibid* at para 94.

[369] *Ibid* at para 92.

[370] *Ibid* at para 142.

[371] See *supra* note 308.

> If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with some success by November 1839.[374]

It seems to be implied that because the deal conformed with the contemporary policy towards the Indian, proper surrender procedures are less important.

Indeed the fact that Cameron was a "businessman in a hurry"[375] also fosters more sympathy in the Court of Appeal than in the Superior Court. The Court accepts that Cameron had a "disregard for the legalities associated with the transaction as manifested by "the fact that he sold large parts of the land and placed settlers on it years before he received the patent and the fee simple."[376] Ultimately however, Cameron's orientation as a land speculator and businessman absolves him of fault or negligence in the transaction. The Court instead blames the dysfunctional Indian department for the lack of formal surrender. Cameron is credited with acting like an efficient businessman pursuing both personal gain and the public good.

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[372] *Chippewas* (C.A.), *supra* note 1 at para 95.

[373] *Ibid* at para 95.

[374] *Ibid at* para 111.

[375] *Ibid* at para 126.

The Court of Appeal simultaneously portrays Joseph Wawanosh as the kindred spirit to entrepreneurial Malcolm Cameron, and the representative of the wishes of the Chippewa band. The Court of Appeal describes Wawanosh's career as "remarkable and checkered."[377] The Court acknowledges that Wawanosh was more westernized than most of the Indian, becoming chief as a result of "his military service on behalf of the Crown in the war of 1812."[378] The Court even acknowledges that Cameron and Wawanosh had close personal ties. The Court writes that,

> Wawanosh, like Cameron, was a Methodist and shared Cameron's entrepreneurial spirit. The two developed a close working relationship. Cameron lent money to Wawanosh from time to time. On various occasions, to the consternation of officials in the Indian Department, Cameron assisted Wawanosh in making direct representations to the Lieutenant Governor or, after 1840, the Governor General.[379]

While all of these statements reflect the Court's recognition that Wawanosh's interests may have aligned more with Malcolm Cameron, there is no strong suggestion that this may have amounted to a conflict of interest in the negotiation of the Cameron transaction. In fact, the Court does not seem to question if Wawanosh in fact dutifully represented the communal opinion of the band. Prior to the Cameron transaction, the Court notes several times where Wawanosh spoke to the Indian Department on behalf of the band and there was "no suggestion that Wawanosh did not speak for the Band on the Upper Reserve in 1830 or 1834, or that he did not accurately convey the collective position of the Chippewas to Jones."[380] Even though Wawanosh was later accused of acting beyond the authority of the band in the 1843 inquiry, the Court makes the inference that Wawanosh must have been acting with the authority of the band because there was no evidence of complaints specifically about the Cameron transaction. Thus, Joseph Wawanosh is both seen as aligned ideologically and culturally with the colonialist interests, *and* representative of the best interest of the Indian.

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[376] *Ibid* at para 126.

[377] *Ibid* at para 82.

[378] *Ibid* at para 82.

[379] *Ibid* at para 96.

Just as in the Superior Court, the Indian is only a matter of speculation and inference. The Court of Appeal, in the face of the lack of historical record that could be called the collective expression of the opinion of the band, ultimately has to rely on inferences from the existing record to determine the will of the band. The Court of Appeal however interprets this absence of a record, more specifically the absence of complaint, as an inference of agreement or consent to the transaction. For example, the Court of Appeal takes issue with the Superior

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[380] *Ibid* at para 88.

Court's characterization of the meeting between Cameron, Wawanosh, and the two other chiefs as a private meeting.[381] The Court of Appeal agrees that a meeting of four and an interpreter was in no way equivalent to a General Council, but finds that "although only three chiefs met with Cameron, nothing in the record suggests that they were the only Chippewas who were privy to the meetings, or that the negotiations or the bargain reached were in any way secret from Chippewas who were on the Upper Reserve."[382] In other words, the absence of evidence that no one else was informed of the meeting and its subject mandates the conclusion that the band must have been informed about the meeting and its discussion. This type of inference is indeed fundamental to the Court of Appeal's findings, for there is no *record* of complaint about the transaction it mandates the conclusion that the Chippewas accepted the transaction. This finding allows the Court to exercise its discretion to refuse to grant the remedy of possession of the land, for the Chippewas then can be blamed for a delay in asserting the claim for approximately 140 years which "combined with the reliance of the landowners, is fatal to the claims asserted."[383]

The Court of Appeal concludes that silence amounts to consent by perceiving the Chippewas as reasonable, active and vigilant parties to the transaction. If one perceives that the Chippewa had the ability to make specific complaints against the Cameron transaction then it leads to the conclusion that they must have consented, or at least acquiesced to the transaction. The Court of Appeal writes that:

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[381] See, Chippewas (S.C.J), *supra* note 1 at para 68.

[382] *Chippewas* (C.A.), *supra* note1 at para 115.

[383] *Ibid* at para 310.

> The evidentiary significance of the absence of any complaint about the transaction or any repudiation of it must be assessed in the context of the entire record. There is overwhelming evidence that the Chippewas were an intelligent people who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights. By 1839, the Chippewas were well accustomed to addressing grievances to the Crown by way of petitions. Those petitions were prepared at General Council meetings and addressed many issues, including complaints with respect to land transactions. On various occasions, the Chippewas' petitions specifically repudiated earlier transactions to which they had allegedly agreed.[384]

The Court of Appeal perceives the Chippewa band at the time of the transaction as a fully competent, self-sufficient group who were capable of representing their interests. Their silence with regard to the Cameron transaction was therefore an indication of their acceptance of it. In direct contrast to the Superior Court, who maintains the exclusion of Aboriginal peoples from the traditional legal order through the replication of the paternalistic patterns established during the early 18th Century, the Court of Appeal instead insists on the equality of Aboriginal and non-Aboriginal peoples. While this negates any contemplation of the inferiority of Indigenous peoples, it allows for the possibility of implicating Aboriginal peoples in their own dispossession where it may not be deserved. In addition it contributes a retroactive consent and participation in the unilaterally imposed colonial order. As Kahn writes:

[The] double grounding of the rule of law in an ideology of both reason

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[384] *Ibid* at para 130.

> and will helps to explain why our political self-conception has been so strong for so long. The two conceptions work independently as well as together. Thus, whatever the flaws that reason can identify in the legal order, we seem to have already accepted law through a collective act of will. Limits freely imposed upon the self are not constraints; they are a manifestation of the self. Looking at law, we believe we are looking at the externalization of our own will...Law's rule appears, therefore, as an expression and systemisation of our own freedom.[385]

This underscores the mechanisms by which the rule of law maintains its legitimacy by implicating the active participation of individuals in it. In relation to Aboriginal peoples, if we retroactively manufacture their consent, we can justify their subordination to colonial law through their participation, even if we may not be able to rationalise it.

Indeed, both Court's creativity in the *Chippewas* case does demonstrate that this case challenged the boundaries of legal reasoning. Thus, by manufacturing the Chippewas' consent, or at least their acquiescence to the transaction, it seems more fair that they are not returned the land. The danger is that Courts attribute this type of retroactive consent through a construction of the historical Indian that does not correspond with the actual sentiments of Indigenous peoples. A discontinuity between the Court's perception of Aboriginal peoples and the actual views of the latter could contribute to the further disillusionment of Indigenous peoples with the Courts as a mechanism for dispute resolution thus alienating them from the judicial process.

V. Conclusion

Through comparing a general historical narrative of the Chippewas, the

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[385] Kahn, *supra* note 14 at 13.

Superior Court's narrative, and the Court of Appeal narrative, three different ways to understand of the events in the *Chippewas* case emerge. There is not only one way to understand the events that the *Chippewas* case is concerned with. An exploration of the three narratives presented above also manifests the myriad of faces the Indian wears–bloodthirsty savage, noble savage, pitiable savage, rationale savage, etc. Through these narratives the genealogy relevant to the decisions in the *Chippewas* case can be excavated. These conditions are the remnants of the historical world of social meanings which still temper current understandings of the Indian. These different packages of ideological baggage can then be explored in relation to how they interact with each other. In this way it may be possible to begin to understand if there is something about the First Nations, and their connection with the social order that precipitates the unwillingness to award them land in this case.

The Superior Court decision manifests a model of relationship between Indigenous peoples and the Crown that does not much differ from the early understandings and perception of the Indian. In this narrative Aboriginal peoples are seen and credited as being a unique peoples with a different worldview and culture from European society. They are the noble and naive victims of a predatory act of colonization and settlement. On one hand this view marks the nefarious presumptions of cultural superiority that inspired the paternal ethnocentrism underlying the attempts to overtake Aboriginal land while civilising its inhabitants: on the other hand however it seeks to ultimately remedy the situation through the same paternalistic treatment. The solution provided is the defeat of the claim to land against the *bona fide* purchasers and send the Chippewas to the Crown to exact their deserved reconciliation.

The Court of Appeal fails to condemn the assumptions of European superiority, and the ignominious results of such suppositions; in doing so it implicates First Nations in the creation of their current situation. Again however, the Court directs the Chippewa to exact their due from the Crown. In jurisprudence however, we now have a precedent in Aboriginal law that demonstrates how to attribute blame to First Nations peoples. Considering the requirements of establishing a claim for breach of fiduciary duty, the implications of this precedent may be great indeed. As the three general characteristics of establishing a fiduciary relationship, as explained by Michael Bryant are:

> (1) The fiduciary has scope for the exercise of some discretion or power
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[386]

The Court of Appeal analysis suggests that the Chippewas were not so very vulnerable, and the Crown behaved not so very negligently.

Returning however to our initially posed question – what is there about the Indian and the connection of the Indian to the social order which makes the Court in the *Chippewas* case hesitant to reward their claim to occupied land? – several interesting possibilities emerge. In the Superior Court decision, Aboriginal maintenance of difference, especially in relation to landholding, may create an unwillingness to dispossess people who are not different in their landholding ways (i.e. the current owners.) More specifically, Aboriginal resistance to private landholding evokes some concern about their ability to 'properly' manage land. In the Court of Appeal decision, the possibility emerges that First Nations peoples, like the rest of Canadian society, participated and consented to their place in the legal and social order. As such, they should be subject to the same treatment. The Chippewas accepted their dispossession, and hence are not worthy of being rewarded the land. As interesting as these potentialities are, however, the fact is that despite these completely divergent perceptions of the Indian, both Courts achieve the same result. This conclusion suggests that the Indian's connection to the social order is not a fundamental ideological reason for the hesitancy to reward them the land. As such, we must explore further.

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[386] M. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 24. See also L. Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada (Toronto: University of Toronto Press, 1996) for a thorough discussion of the fiduciary relationship between the Crown and Canadian indigenous peoples.

Chapter 6: The Land

I. Introduction

The previous chapter touched on the question of whether there was something about the Indian, connected to the social order, that makes the Court hesitant to award the land to the Chippewas in the *Chippewas* case. That chapter demonstrated that despite divergent perceptions held by the Superior Court and the Court of Appeal, the result of the case was nonetheless the same. Thus, while some interesting implications arose out of the analysis of the differing construction of the Chippewa people in the two Court decisions, it does not seem to be a potent underlying ideological reason that both Courts denied the Chippewas' claim to possession of the land. We did discover however that private property, in the form of land, was seen as a mechanism by which the Indian could be civilised. This chapter will continue to interrogate the possible connections between land and the decision in the *Chippewas* case. As such, this chapter will try to determine if there is something about land, connected to the social order, that makes the Court hesitant to award it to the Chippewas. This chapter will first explore the sentiments of the Superior Court and the Court of Appeal with regard to the land. This exploration will demonstrate that there is an unwillingness to disturb the rights of the current owners for both economic and non-economic reasons. At the Superior Court level, Justice Archie Campbell emphasizes that the land represents a valuable commodity; but also, more importantly, he infuses the land with sentimental value and thus suggests that it would be fundamentally unjust to deprive the current owners of the land. The

Court of Appeal decision also reflects the position that it would be unjust or morally wrong to deprive the current owners, but for the reason that to deprive them would not reward their legitimate expectations. This chapter will then discuss Jeremy Waldron's concept of the normative resilience of property to help explain the moral aspect of both decisions.

II. The Superior Court's construction of the land

The Superior Court's decision to apply the defence of good faith purchaser for value is ultimately the vehicle by which the Court justifies denying the remedy of possession to the Chippewas. This defence is described by Justice Campbell as "a fundamental principle of our laws that a concluded sale should not be set aside if an innocent third party has acquired rights for value without notice of the adverse claim."[387] In this case he supports the application of this rule through examining the "situation of the owners of these lands, the people whom the plaintiffs by their application of damages and a vesting order seek to divest their homes and workplaces."[388]

This exploration portrays the land as a valuable commodity, as well as infusing it with important sentimental value. In discussing the land's value as a commodity, Justice Campbell notes that Amoco Canada had "made significant investments and improvements"[389] amounting to approximately $200,000,000.

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[387] *Chippewas* (S.C.J.), *supra* note 1 at para 688.

[388] *Ibid* at 695.

[389] *Ibid* at 696.

CNR, Union Gas and Dow Chemical also contributed similar amounts to improvements on the land. The estimated value of improvements by residential owners, solely in mortgage funds is "in excess of $50,320,000.00."[390] The Court refrains from guessing "the number of hundreds of millions of dollars invested by the innocent owners on the strength of their title to the land,"[391] but the implication is clear–even the residential investments represent no small sum. The mention of the value of the investment in the land, made by both commercial and private parties, reflects a "basic law and economics stand",[392] as well as the Lockean "labour and desert"[393] theory. The law and economics perspective evaluates laws by exploring their economic consequences. As Ziff explains:

> Some economists treat the law as no more than a pricing mechanism within which property and labour serve as the chief commodities of exchange. And according to the conventional economic position the principles governing property will tend toward efficiency and wealth maximization if several features are in place. First, the law should protect *exclusivity* of ownership, that is, it should effectively enforce my ownership rights and ensure that these exclusive rights cannot be infringed or exploited by anyone else without my say so. Second, the law should allow entitlements to be *transferable*, so that they can circulate in the market. If this is done, property interests should eventually gravitate to the person most interested in purchasing those interests. Third, the law should make a broad array of items available for exchange. Property should be as *universal* as is feasible. In addition, the idea of universality suggests that the ownership rights should be made available to as many

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[390] *Ibid* at 700.

[391] *Ibid* at 701.

[392] See Ziff, *supra* note 7 at 10-17.

[393] See *Ibid* at 27-34 for a good overview of labour and desert justificatory theories.

people as possible. The more players the better.[394]

Justice Campbell's discussion of the economic investment to be lost if the land were to be awarded to the Chippewas reflects this concern with the economic consequences of such a result. This discussion is also suggestive of the labour and desert perspective which alleges that one is "entitled to those things over which they have laboured."[395] This becomes especially relevant if one considers only the economic aspect of the labour and desert theory which simply asserts that "the failure to prevent the taking of positive externalities is economically unsound"[396] because "if people are not rewarded [by the grating of a proprietary interest] they will not labour."[397] The general implication is that if Courts fail to protect current title holders, the benefits that accrue to society as a result of the improvement of property will cease. Indeed, all owners would cease to have confidence that any investment in their properties would be secure.[398] This principle is manifest in the existence of the law of adverse possession, and the existence of stringent limitation periods in traditional property law.[399]

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[394] *Ibid* at 10.

[395] *Ibid.*

[396] *Ibid* at 30.

[397] *Ibid.*

[398] See H. DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). In this book DeSoto argues that the failure of capitalism to develop in the third world, and ex-communist states is indeed the result of ill-defined property rights.

The less easily described portrayal of the land, and its relationship with the individuals currently occupying it, is its importance aside from being a commodity. This value could be called its sentimental value. This aspect of the importance of property is also nicely reflected in the differing oft-debated justifications for private property. The "personhood, moral development and human nature"[400] theory, is particularly relevant, as it discusses the value of private property in individual happiness and fulfilment. Mary Jane Radin, for example, has developed an intuitive theory of personhood which recognizes the sentimental 'investment'[401] individuals have to objects and things.[402] As a result of this important aspect of personal property, she proposes that:

> (1) At least some conventional property interests in society ought to be recognized and preserved as personal.
>
> (2) Where we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.

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[399] See Ziff, supra note 7 at 123-126 for a discussion of the rationales for the law of adverse possession, which reflect the principles discussed herein.

[400] See *ibid* at 24-27 for a good overview of this justificatory theory.

[401] There are many aspects of this type of sentimental attachment that have been explored in the field of psychology, which I am unable to explore in this particular project due to the limited knowledge I possess in this field. See, for example, L. Bloom "People and Property: A Psychoanalytic View", (1991) 6 J. Soc. Behavior & Personality 427.

[402] M.J. Radin, *Reinterpreting Property* (Chicago: Chicago UP, 1993).

> (3) Where we can ascertain that a property right is fungible, there is a *prima facie* case that that right should yield to some extent in the face of conflicting, recognized personhood interests not embodied in property. This case is strongest where without the claimed personhood interest the claimant's opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.[403]

While these proposals could potentially be used to argue for both the Chippewas and the current occupiers cause in the *Chippewas* case, Justice Campbell falls squarely on the side of the current occupiers personhood interests in the land. First, he emphasizes the "deep connection of the thousands of people who live and work in the disputed land who would be divested of their homes and workplaces if the ultimate remedies sought by the Chippewas were granted."[404] This deep connection is evocative of what Radin describes as, [o]ur reverence for the sanctity of the home...rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society."[405] While the Court admits that the infringement of Aboriginal title is one of the most serious types of interferences, and hence more difficult to justify, they believe that the interference with the Chippewas' title to this particular piece of land is mitigated by the Chippewas' lack of attachment to the land. Justice Campbell explains:

> The seriousness of this interference is mitigated by the fact that the plaintiffs have no present or recent connection with this land. They have no communal memory or oral history of its wrongful dispossession. There is a strong community interest in protecting the rights of the native

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[403] *Ibid* at 71.

[404] *Chippewas* (S.C.J.), *supra* note 1 at para 702.

[405] Radin, *supra* note 403 at 71.

> population in those lands to which they had a longstanding connection. This is not such a case. There is no substantial connection between the aboriginal plaintiffs and the disputed land. Their connection with the land was completely severed many generations ago in 1853. To this land, they are perfect strangers. The wrong done is purely historic. The only present connection between the plaintiffs and this land is what they have read about it in the archival records and in this lawsuit. The seriousness of the interference is further mitigated by the fact, without in any way addressing the issues in damage action against the Crown, that either the full purchase price or something substantially like it was actually received in trust for the Chippewas at a price per acre thought by some contemporaries to be fair and said by the plaintiffs' expert to be reasonable. The seriousness of the interference is further mitigated by the fact that the Chippewas have a legally adequate alternative remedy in an action against the Crown for damages and in particular for any improvidence or deficiency in the purchase price or the interest payments. The seriousness of the interference is further mitigated by the lack of any evidence of fraud. Without addressing in any way the issues in the damage action It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal for the Chippewas, and simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy.[406]

It thus seems that Justice Campbell bases much of his decision by balancing each groups' attachment to the land. This is suggestive of Radin's idea that one can "gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. In comparison, Justice Campbell decides that the current owners' sense of loss would be far greater than the Chippewas.[407] It is thus fairer to maintain the current owners' possession, and direct the Chippewas to seek monetary damages. This is further supported by Justice Campbell's perception that the Chippewas' loss could be remedied by monetary damages, while the current owners' loss could not be by allayed by such compensation. This approach also reflects Radin's discussion that an object is more closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement."[408]

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[406] *Ibid* at para 752.

[407] The conclusion that the Chippewas' loss is lesser than the current owners would be if deprived of the land is based upon an ethnocentric version of personhood. This conclusion ignores the possibility of a strong spiritual connection with land which is transgenerational. See *Report on the Royal Commission on Aboriginal Peoples* (Ottawa: Canada

In result, Justice Campbell thus concludes that the benefits derived from dynamic "security of title" by ensuring the "peaceable possession " of "purchasers for value innocent of any wrongdoing"[409] outweighs the Chippewas' historical claim to the land. As Justice Campbell concludes:

> It would therefore be unconscionable, and would bring the administration of justice into disrepute, to let this action proceed against the present owners. It would not promote the reconciliation of aboriginal societies with the rest of Canadian society to cloud the titles and potentially divest of their homes and workplaces thousands of innocent people spread over a quarter of a modern city on the basis of a defect in an 1853 land patent when the aboriginal claimants have a legally adequate alternative remedy against the Crown. To punish the innocent residents of Sarnia for an ancient wrong by the Crown would defeat the goal of reconciliation that is so central to the just resolution of aboriginal land claims.[410]

As such, there is hesitancy to deprive the current owners of the land both because of the amount invested in the properties, as well as this suggestion of how depriving the current owners would be morally unconscionable based upon the

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Communications Group, 1996) vol.2. at 448. See also Ziff, *supra* note 7 at 333-336 for a good discussion of Aboriginal concepts of ownership.

[408] Radin, *supra* note 403 at 37.

[409] *Ibid* at 753.

attachment of the current occupiers to the land.

III. The Court of Appeal's construction of the land

While the Superior Court relies fairly heavily on the amount of attachment each party has to the land to justify denying a remedy of possession, the Court of Appeal instead relies on the general concept of reliance. From the perspective of public law remedies, the Court of Appeal is of the opinion that the discretionary factors, derived from *Immeubles Port Louis Ltee c. Lafontaine (Village)*[411] weighed in favour of the defendant landowners through emphasizing the reliance of the landowners on a seemingly valid Crown patent. From a private law perspective, the Court also stresses the reliance of the current occupiers on a Crown patent, but also underscores the role of the Chippewas in their own dispossession through their failure to earlier correct the situation. Thus ultimately "the Chippewas' delay, combined with the reliance of the landowners [was deemed to be] fatal to the claims asserted by the Chippewas."[412]

The Court of Appeal's approach, in contrast to the Superior Court's, seems to reflect a more utilitarian version of property. While the protection of the current occupier's interests can be seen as furthering a law and economics standpoint through protecting the exclusivity of the current owners, the Court of Appeal seems to also have a utilitarian view of property which is very reminiscent

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[410] *Ibid* at para 756.

[411] *Supra* note 193.

[412] *Chippewas* (C.A.), *supra* note 1 at para 310.

of the thoughts on property espoused by Jeremy Bentham. Bentham's view of utility, as described by Ziff, is the "calculus of pleasure over pain."[413] Fundamental to pleasure is "the ability of society to promote equality, security, subsistence and abundance."[414] Indeed some of these virtues however can conflict, thus it is important to note that in Bentham's view security must not be sacrificed for equality. He writes that

> When security and equality are in conflict, it will not do to hesitate a moment. Equality must yield. The first is the foundation of life, subsistence, abundance, happiness, everything depends upon it. Equality produces only a certain portion of good... If property should be overturned with the direct intention of establishing an equality of possession, the evil would be irreparable. No more security, no more industry, no more abundance! Society would return to the savage state from whence it emerged.[415]

This is the case, because of the importance of "[t]he idea of satisfying expectations [as] a central feature of Bentham's version of utility; and this is linked, of course with the need for security of property holdings. He was convinced that an extensive confiscation of property would deaden industry."[416]

The Court of Appeal's rationale for denying the remedy of possession, in relation to the public law perspective, reflects this utilitarian concern with the allocation, or reallocation of property. The Court writes:

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[413] Ziff, *supra* note 7 at 17.

[414] *Ibid.*

[415] J. Bentham, "Security and Equality of Property" an extract from J. Bentham, *Principles of the Civil Code*, excerpted in C.B. Macpherson (ed.) *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978) 50 at 57.

[416] Ziff, *supra* note 7 at 18. See also A. Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1986) at 91-117.

> Apparently valid acts of public officials are relied upon by the members of the public at large in planning their affairs. Official documents are taken at face value. The purported exercise of a statutory or prerogative power creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration.[417]

Therefore, "a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision."[418] The fact that "many elements of a formal surrender were in fact accomplished,"[419] the lack of *mala fides* on behalf of the Crown, and the 150 year delay between the granting of the patent and the Chippewas' assertion of the claim convince the Court that the balance did not lie in the Chippewas' favour. The Court thus concludes that reliance on patents to give good title should not be undermined. The Court writes:

> The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third party reliance

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[417] *Chippewas* (C.A.) *supra* note 1 at para 258.

[418] *Ibid.*

[419] *Ibid* at para 270.

than that presented by the landowners.[420]

Indeed, this concern with the reliance upon the Crown patent, and the concern with security over equality seems to reflect a utilitarian concern with the continuing order and stability of society

The private law remedies explored by the Court also include much the same reasoning. They express the opinion that, "the Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the *status quo*. This is a situation that would be unjust to disturb."[421] Indeed, there again seems to be the view that depriving people who relied upon the strength of their title would be inequitable. Unlike the public law discussion, however, the private law doctrine of laches and acquiescence simply allocates a measure of blame to the Chippewas for not asserting their grievance earlier, thus allowing the reliance to occur. As such, depriving the current occupiers of their land would be unjust. Again, as with the public law discussion, there is a concern with satisfying the reasonable expectations of the occupiers.

IV. The normative resilience of property and the *Chippewas* case

Whether one prefers Justice Campbell's personhood approach, or the Court of Appeal's utilitarian approach, there is a common feeling, in both decisions, that to deprive the current occupiers of their land would be unjust. According to Jeremy Waldron, this phenomenon whereby there is the sentiment that it is wrong to deprive a current owner of property even if their possession could be considered unjust, is "the normative resilience of property."[422] As Waldron explains:

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[420] *Ibid* at para 274.

[421] *Ibid* at para 299.

> the way in which certain normative judgments (such as judgments about honesty and dishonesty) by which property rights are upheld are insulated from other normative judgments about the property rights (such as judgments about their justice or injustice, their justification or lack of justification). The concept of normative resilience points to a discontinuity between two types of normative judgments associated with an institution: (1) judgments concerning the justification of the institution, and (2) judgments concerning individual conduct in relation to the institution. Resilience is the phenomenon whereby judgments of type 2, although they are predicted upon the institution nonetheless remain unaffected by judgments of type 1 that are adverse to the institution. A resilient institution continues to exert itself normatively through its type 2 judgments, notwithstanding the fact that it is discredited at the type 1 level.[423]

In relation to Aboriginal land claims this phenomenon can be understood as the following: even if we perceive that the initial allocation of land which deprived Aboriginals of their land was wrong (type 1 judgment), we continue to assert that it would nonetheless be "inequitable" to deprive current landholders to correct that injustice (type 2 judgment).

This phenomenon can be explained through psychological accounts, utilitarian accounts, and through the "social pervasiveness of property".[424] Psychological accounts, emanating from scholars such as David Hume and Margaret Jane Radin, explain this phenomenon by stressing the close connection and attachment that can develop between an individual and his or her property. As Waldron writes:

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[422] J. Waldron, "The Normative Resilience of Property" (1998) 9 Otago L.Rev. 195. See also J. Waldron, "Property, Honesty, and normative Resilience" in S. Munzer, ed. *New Essays in the Legal and political Theory of Property* (Cambridge: Cambridge UP, 2001) 10.

[423] Waldron, "The Normative Resilience of Property" (1998) 9 Otago L.

> It is not hard to think of a psychological explanation for the resilience of a judgment like 'This farm belongs to me.' Someone who has been designated officially as the owner of a given piece of land is likely to have actual control of the land: he will know it intimately, he may inhabit it with his family, cultivate it, earn his living from it, care about it, and regard it as part of the wealth that he relies on for his own security and that of his descendants. He will be able to point to features of the land where his work and his initiative have made a difference, so that the land will not only seem like his; it may even look like his (in the way that a work of art looks like the artist's). These effects are likely to accrue to him by virtue of the operation of the system or property as positive law quite independently of whether it is just or unjust, or whether he or anyone else regards it as just or unjust.[425]

Indeed, this personhood attachment to the property emerged quite strongly in the *Chippewas* case.

A utilitarian account, focussing on the ideas of Bentham, also recognizes the importance of this attachment. In Bentham's theory however, ensuring the security of property to which one may be attached becomes even more important. Indeed, if we reflect upon the earlier discussion of the Court of Appeal decision and its reflection of a utilitarian concern with reliance, in this chapter, this security becomes a primary and fundamental social good.

Rev. 195 at 198.

[424] *Ibid* at 215.

The "social pervasiveness of property"[426] also factors in to the tendency to perceive depriving people of their existing property rights as a moral wrong. He argues that property, and respect for others' property, is connected to our evaluation of peoples' general moral integrity. Waldron explains:

> An established system of property is not simply one aspect, among others, of the social structure. It is quite all-encompassing, for it establishes much of the context in which we deal with others, relate to them, trade with them, work with them, and compete with them. Whether we like it or not, we all have to learn how to get by in the prevailing system of property. We have to learn which things are 'ours' and which not; how to acquire something we don't already possess; under what circumstances we will gain the benefit of others' work with the resources *they* possess; and in general how industry, commerce, and social intercourse are carried on in a world composed of objects and places designated as items of property. One who shows himself incompetent in this regard, even in one instance, is liable to be suspected as a kind of *general* menace; if he doesn't take property seriously *here*, we may say, he may not take it seriously anywhere. (After all, we do rely to an enormous extent on people's voluntary willingness not to just run off with things they covet or break into whatever places they like.) And if this person doesn't take this part of the social fabric seriously–why, he may not take any of it seriously. If we can't trust him not to steal a towel from a hotel, can we trust him with our accounts or with our children? Can we trust him to tell the truth or keep his engagements or do the work that he promises to do?[427]

While Aboriginal land claims cannot be fully equated with an action demonstrable of complete disrespect of property, such as theft, they do challenge the dominant system of landholding, with which most individuals are familiar. Thus, through challenging the current allocation of property, regardless of the justice of the initial allocation, he or she signals a general untrustworthiness and

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[425] *Ibid* at 208.

[426] *Supra* note 424.

dishonesty. Thus, not only is there the potential that we distrust the Indian for not fully embracing the concept of private property, as we discussed in the previous chapter, but also there is the potential that the attempts of First Nations to reclaim land that is currently owned is a reflection of their moral inadequacy. Indeed, by way of personal anecdote, I have heard said on many occasions that Aboriginals do not deserve to succeed in land claims because they did not make any improvements to the land before we came so it would be unfair that they get the benefit from it now. This seems to suggest that a successful land claim is an ill-deserved gain.

Both the Superior Court judgment and the Court of Appeal judgment contain the sentiment that the deprivation of the current occupiers of the land would be unjust. Despite the different bases of this perceived injustice, Waldron's concept of the normative resilience of property fairly neatly applies. Both the Superior Court's concern with the occupiers attachment to the land, and the Court of Appeal's concern with not disturbing the current occupiers reasonable expectations reflects factors that Waldron alleges contribute to this. The normative resilience of property also lends an interesting perspective on how Aboriginal land claims may affect the modern perception of Aboriginal peoples. Indeed, if we consider Waldron's discussion of the social pervasiveness of property, the mere attempt to reclaim the land may contribute to the social perception of First Nations honesty, for possibly "someone who violates existing

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[427] Waldron, *supra* note 424 at 215.

property rules in one regard is *in general* not to be trusted."[428] Indeed, it is possible that land claims create a distrust of First Nations by demonstrating that they are not willing to simply accept the prevailing system, but are going to actively attempt to change it.

V. Conclusion

In the film *Gone With the Wind*, Gerald O'Hara scolds his daughter Scarlett for not caring about the plantation. He chides her:

> Do you mean to tell me, Katie Scarlett O'Hara, that Tara - that land doesn't mean anything to you? Why, land's the only thing in the world worth working for, worth fighting for, worth dying for, because it's the only thing that lasts.[429]

Indeed, the *Chippewas* case demonstrates that it could be, as Gerald O'Hara believed so vehemently, that land is the only thing worth fighting for. In the previous chapter, we discovered that landholding is seen to have an educative function, and represented a sufficient condition to mark the acculturation of the Indian. This chapter, through its investigation of whether it is something about land, connected to our social order, has demonstrated that there are several dimensions of the concept of property that contribute to the Courts' unwillingness to award the Chippewas the land. First, and most obviously, there is the economic value of the land which creates a clearly noticeable hesitation to reward the Chippewas the remedy they were seeking. Second, and more interestingly, there is a moral aspect to these decisions. This moral aspect manifests itself in the Superior Court decision through the emphasis on the deep connection that the current owners have cultivated with the land, compared to the Chippewas' lack of connection. In the Court of Appeal, this moral dimension manifests itself through the importance of the utilitarian need to reward legitimate expectations. These concerns, economic, moral, and utilitarian, all contribute to what Waldron terms the 'normative resilience.' According to this phenomenon, there may be an underlying feeling that First nations are being dishonest or are untrustworthy by wanting to deprive the current owners of their land. This, indeed, may be true despite the reprehensible way the initial allocation was made.

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[428] *Ibid* at 216.

[429] V. Fleming, *Gone With the Wind*, (Santa Monica: Metro Goldwyn Mayer Home Entertainment, 1939)

Chapter 7: The Law

I. Introduction

Thus far, we have explored whether there is something about the Indian, or the land that contributes to an unwillingness in the *Chippewas* case to reward the Chippwas claim to the land. The previous chapter concluded that the importance of land in the social order contributes to an unwillingness to disturb the current possessors occupation in the *Chippewas* case. If we refer back to Kahn's second methodological rule, however, that "the rule of law is not the product of rational design"[430] we are reminded that "[w]e should not expect all of the elements of any cultural form to fall into systematic order in which they are rationally related to one and other. Instead we should expect to find a multiplicity of overlapping meaning."[431] As such the inquiry should not end with the conclusion that one factor influenced the decision. This chapter, in the interest of a more thorough exploration, will thus ask one final question: Is there something about the law of Aboriginal title, connected to the social order, that contributes to the hesitancy to reward the Chippewas' claim for possession of the land.

This question will be approached using a deconstructionist paradigm that approaches "[s]ymbolic and ideological meanings" by exploring "binary oppositions"[432] not as stable pairings, as in structuralist analysis, but as continually both deferred and different (*différance*) in a process of continually producing and postponing meaning. This approach is based upon the deconstructionist view that the relationship between a signifier (the word 'tree'), and the corresponding signified (e.g. a tree) is fundamentally unstable. This is because they "owe their seeming identity, not to their own 'positive' or inherent features but to their differences from other speech sounds, written marks, or conceptual significance."[433] Thus the way we understand the word "tree" is not because of a static image of a tree in the mind of a person thinking about it, but rather the fact that a tree is not short and scrubby like a bush. Within this world-view, however, perceptual nuances are rampant for one may think that a particular plant is too short and scrubby to be a tree, when another individual used to short and scrubby trees does not. Thus, the understanding of concepts is not fixed, but relational. If we expand this to the task at hand, the aspects that are important about the 'dominant landholding system' can be better understood if we understand what we define it against– *sui generis* Aboriginal title.

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[430] *Supra* note 29.

[431] Kahn, *supra* note 14 at 98.

This will begin by exploring how Aboriginal land title has been constructed, and how that reflects upon the construction/creation of the dominant landholding system and its social meanings. For example, Aboriginal title is perpetually being described as unique or different from the dominant landholding system. If then, the Court defines *sui generis* Aboriginal title as communal, this suggests that an important characteristic of the dominant landholding system is that it is indeed not communal. As such, it emphasizes the private, or individual aspects of the dominant landholding system. This is so despite the fact that there are many different manifestations of landholding that allow for multiple owners. It is thus through recognizing what we consider alterior, that we can explore what constitutes 'normal'. Thus, through exploring what characteristics have been attributed to Aboriginal interests in land, we will be able to see the contrasting qualities of our own landholding system and its underlying ideologies more clearly. This will also allow us to determine what the points of tension or conflict between the two types of landholding are.

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[432] P. Brooker, *A Glossary of Cultural Theory* (New York: Oxford, UP, 2002) at 75.

[433] M.H. Abrams, *A Glossary of Literary Terms*, 6th ed. (Toronto: Harcourt Brace Publishers, 1993) at 226.

II. Deconstructionist analysis of the pre-existing nature of Aboriginal title

The characteristics of Aboriginal title which will be used to refine the exploration of the construction of the dominant landholding system emerge from the *Delgamuukw* decision discussed in chapter 4. In this chapter we saw that the first characteristic of Aboriginal interests in land that makes it distinct from common law title is its origin. Aboriginal tenure "arises from the prior occupation of Canada by aboriginal peoples,"[434] Aboriginal title is, therefore, not a creation of colonial law, but an entitlement that survived colonization.

If Aboriginal title is constructed as an alterior pre-existing system, which was in place independent of the British legal system and their courts, then the obvious construction of the dominant landholding system is that it is the normal, and indeed the dominant landholding system. In extension, the courts then, in evaluating a claim under one system as against the claim from the other system, is ultimately ideologically fixed, located, and indeed, charged with defending the dominant one. The quite plain fact is that ultimately it is the non-Aboriginal legal system that determines the fate of a First Nations claim. As Peter Russell writes about the potential of success for judicial initiatives for Aboriginal reconciliation, the "historical record"[435] in Canada and other post-colonial countries do not inspire hope for the future of judicial reconciliation of Aboriginal rights. As he writes, the

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[434] *Delgamuukw, supra* note 112 at para 114.

> most profound, limitation on the highest courts as agents of reconciliation are structural and ideological. To Aboriginal peoples, these courts are still apt to be seen as the "white man's courts"–too non-Aboriginal in their membership and too tied to the dominant society to be viewed either as truly independent and impartial adjudicators of their rights or as bridge builders crafting a jurisprudence that is equally sensitive to the perspectives of both the larger settler-dominated society and the Aboriginal peoples enmeshed in that larger society. Even the most progressive judicial pronouncements on Aboriginal rights–from John Marshall to Antonio Lamer–have retained an ideological core that is antithetical to Aboriginal perspectives. This is their treatment of sovereignty. Progressive as the highest courts in these four English-settler countries [Canada, the United States, Australia, and New Zealand] have been at times in constructing legally enforceable Aboriginal rights, they have held back from questioning the legitimacy of the full sovereign power of the settler state over the Aboriginal peoples. This is the hard residue of imperialism retained in this evolving jurisprudence. It is present still in *Delgamuukw*, as progressive a decision on Aboriginal

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[435] P. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247 at 274-5.

rights as has ever issued from a common law court.[436]

A parallel system of landholding may have been recognized by the Canadian courts, but the extent to which it can make fundamental substantive gains is questionable, for in order to make such gains the courts would have to be willing to sacrifice the priority given to the dominant landholding system. Indeed, even the constitutionalisation of Aboriginal rights allows for the dominant landholding system to take priority. As Kent McNeil has written, "in practice, if not in constitutional theory, Aboriginal title could enjoy better protection against infringement under current expropriation legislation than it does under the Canadian constitution."[437]

A related problem emerging from a deconstructionist analysis is the elusive nature of Aboriginal legal principles when an institution rooted in a wholly different ideological sphere must create them. Indeed, Aboriginal *sui generis* title is defined largely by the simple idea that it is different. It is also marked by deferral. In *Guerin*, for example, then Chief Justice Dickson wrote:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis*

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[436] *Ibid* at 274-5.

[437] K. McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) 293 at 308. See also, K. McNeil "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) 281 for a discussion of the effects of the constitutionalisation of other Aboriginal rights.

> interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. *Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.*[438]

This description attributes broad characteristics to Aboriginal title, but then defers making any other descriptions. As such, there is not much meat on the metaphorical bones of Aboriginal title. As Kent McNeil so aptly described

> In Canada, the land rights issue is still unresolved. As we have seen, the Supreme Court's most recent remarks on the matter described the Indian's interest in lands traditionally occupied by them as *suï generis*: a unique interest which, strictly speaking, is neither beneficial nor personal and usufructary in nature. The members of the court who dealt with this issue said the Indian interest is best characterized by its general inalienability, coupled with the fact that surrender of the interest to the Crown creates a fiduciary obligation on the part of the Crown to deal with the lands for Indians' benefit. That is as close as the Canadian judiciary has come to explaining aboriginal title, even though the courts have had ample opportunity over the past century to display substantial creativity in the area. Rather than seize the chance to develop a coherent body of law relating to aboriginal land rights, judges have studiously avoided the issue whenever possible, cautiously confirming themselves to vague general statements. As a result, this area is probably one of the most uncertain in Canadian law.[439]

These comments published in 1989, still have a ring of truth in the present day, as there is still a lot of uncertainty about Aboriginal title. A state which is a direct result of a judiciary, ideologically rooted in the dominant landholding system, both being charged with defining the characteristics of a landholding system foreign to them; and being given the task of determining the fate of claims emanating from this foreign landholding system that threaten the integrity of the system they are bound to protect.

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[438] *Supra* note 204 at para 50 (italics added).

Additionally, s*ui generis* Aboriginal title requires the court, an institution that is not skilled in the art of creation, to do just that. As Kahn explains,

> [The] historicity of law is its single most prominent feature. Legal decision-making differs from any other kind of policy formation in just this way: it always begins from a set of sources that already have authority within the community's past. Legal arguments do not begin by asking "the best outcome, all things considered."[440]

The concept of *sui generis*, unlike the normal application of existing rules, requires the court to look outside of all precedent, and engage in the act of creating, defining, and substantiating a concept, which is only generally described as different. This however is not a strong point of the law. As Kahn explains:

> Law understands the meaning of an event an instance of a rule that already exists. As a matter of law, that rule creates the possibility of the event. Legal perception sees the event in the light of its possibility, locating what is already important about the event in the rule. Legal inquiry always asks whether the event or proposed course of action has been authorized by an existing rule or rules...Justice under law, we say, is blind.[441]

This being the case, it is not surprising that through the application of the concept of *sui generis* no new legal rules are created as existing legal rules are simply

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[439] McNeil, *supra* note 218 at 303-4.

[440] Kahn, *supra* note 14 at 43.

applied by analogy. In *Delgamuukw*, for example, then Chief Justice Lamer, uses the analogy of equitable waste to better describe his idea of what uses irreconcilable to the attachment of Indigenous peoples to the land may be. He writes that the "description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here."[442] This demand to create new legal rules, arguably, simply allows the court discretion to ignore the existing legal rules that they reason to be inapplicable, and apply the ones that they feel are most applicable in the situation. In the Superior Court decision this principle manifests itself in the application of an analogous limitation period under the doctrine of *bona fide* purchaser. In the Court of Appeal, it manifests itself in the dismissing of the age-old priority rules, in favour of applying public law principles and equitable doctrines to dispossess the Chippewas.

III. Deconstructionist analysis of the inalienable nature of Aboriginal title

The second characteristic of Aboriginal interest in land is its inalienability. In *Delgamuukw* Chief Justice Lamer explains this characteristic emanates from the "special bond with the land because of its ceremonial or cultural significance."[443] This creates the restriction, as described by then Chief Justice Lamer in *Delgamuukw*, that:

> lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the

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[441] Kahn, *supra* note 14 at 70

[442] *Delgamuukw*, *supra* note 112 at para 130.

[443] *Ibid* at para 128.

> relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[444]

The land can, however, according to *Delgamuukw*, be put to irreconcilable uses, is if it is in the public interest as aboriginal interests must be balanced with the needs of broader society. Thus, if, for example, society requires "agriculture, forestry, mining, and hydroelectric power"[445] then these requirements "can justify the infringement of aboriginal title."[446]

If Aboriginal interests in land are unique because of their inalienability, then the dominant landholding system seems to be constructed as one that emphasises alienability. Indeed, there is a distinct trend towards emphasizing the importance of land as a commodity. As Alexander argues in *Commodity and*

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[444] *Ibid* at para 128.

[445] *Ibid* at para 167.

[446] *Ibid.*

Property:

> Evidence of the shift in legal perceptions toward a commodity conception of property is not hard to come upon in legal discourse. The dramatic growth of the law-and-economics movement within the past twenty-five years itself strongly reflects the change. Economic reasoning treats property exclusively from a market perspective, in which all resources that have market value (or would if the law permitted a market to exist) are property, or at least potentially property. The sole function of property rights, in the words of the economist Harold Demetz, is to 'guid[e] incentives to achieve a greater internalization of externalities." Translated, the theory holds that property rights maximize aggregated social wealth by encouraging people to take into account the costs and benefits of how they use their property. To perform their wealth-maximizing function, property rights must be freely transferable. As Judge Richard Posner states in his influential book, Economic Analysis of Law, "Value maximization requires a mechanism by which the [current owner] can be induced to transfer rights in the property to someone who can work it more productively; a transferable property right is such a mechanism.[447]

The shift from dynamic to static security systems, through the creation of land titles registration system, also demonstrates increasing conception of land as commodity. As Pamela O'Connor explains, when a market for land develops as dynamic security regime becomes more beneficial as it protects "security of transaction...because it reduces or eliminates risk that the purchaser's title will be subject to unknown prior claims or title defects. This limits purchasers' transaction costs by limiting the inquiries that they need to make, and by reducing their risk-bearing (residual certainty after inquiry."[448] Using the example of England, she explains:

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[447] G.S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970* (Chicago: University of Chicago Press, 1997) 379-80.

> Until the late 19th century, land ownership in England was concentrated in the hands of the aristocracy, for whom landownership provided dynastic continuity and status. Their priority was to ensure that the estate would remain in the family for generations to come, no matter what reduction in circumstances might befall the family. They achieved this through use of strict settlements, a mode of landholding that restricted the powers of heirs to dispose of interests in land to persons outside the family succession. Aristocratic landowners were not interested in dynamic security, since they had not acquired their land through purchase and had no intention of selling it. Even when market transactions in land started to become more common, informal institutions were able to moderate the purchaser's risk and inquiry costs. In the early stages of development, markets were small and localized. At a time when most people still lived in settled rural communities with little personal mobility, local knowledge of land dealings might be considerable. Prior inconsistent interests or disputed dispositions were more easily discovered by purchasers through local inquiries.[449]

As such, the "emergence of a market for land"[450] and its importance as an easily transferable commodity has made alienability with relative ease an important characteristic of the dominant landholding system.

The relationship between Aboriginal interests in land and the dominant landholding system is indeed rather antithetical in relation to this characteristic. The inalienability of Aboriginal title, and the concept of irreconcilable uses, limits the potential uses of Aboriginal land. The implication of this suggestion is that once land becomes deemed Aboriginal land, it falls almost irrevocably outside sphere of any modern potentialities that may compromise Indigenous peoples connection to it. While some scholars have argued that this limit curtails the

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[448] O'Connor, *supra* note 135 at 97.

[449] *Ibid* at 99.

[450] *Ibid* at 100.

economic potential of such land,[451] this is still a fairly unclear restriction. Potentially, this lack of clarity, however, may be more threatening than the restriction itself.

IV. Deconstructionist analysis of the communal nature of Aboriginal title

The final of the tripartite of characteristics used to describe Aboriginal title is its communal nature. As then Chief Justice Lamer writes:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.[452]

In addition to making it marginally more difficult to alienate Aboriginal land by requiring a group agreement in order to do so, communal landholding, in general, has often created adverse reactions in Canadian history.[453] Groups that prefer communal landholding have been met with resistance in Canada, The province of Alberta, for example, enacted a spate of legislation starting in 1942 that controlled

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[451] See T. Flanagan, *First Nations? Second Thoughts* (London: McGill-Queen's UP, 2000) 113-33 for an argument which elucidates the possible economic disadvantages of the concept of *sui generis* title.

[452] *Delgamuukw*, *supra* note 112 at para 115.

[453] See S.A. Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990) Plains Indian tribes were also subject to limitations in their use of land, such as the restriction that they had to sow seed by hand and harvest using scythes rather than more modern and effective machinery.

Hutterite acquisition of land.[454] This law prohibited selling land to Hutterites or enemy aliens. This law was struck down in 1944 for its reference to enemy aliens, but was re-enacted the same year without the reference to enemy aliens. While the restrictions were loosened, there was legislation controlling Hutterite landholding in Alberta until 1972. In 1974 a report was issued ensuring the public that Hutterite landholding would indeed "have no detrimental effect on land use and no significant effect on pattern of land tenure in Canada."[455]

This strong reaction to communal landholding can be explained by the great importance of property. Indeed, property, and in particular, land is very important. This statement may initially bring to mind Sir William Blackstone's famous statement about how property "strikes the imagination and engages the affections of mankind" in its power to give "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[456] Land, however, plays an even more important role than any other types of property. As Ellickson explains, "[b]ecause human beings are fated to live mostly on the surface of the earth, the pattern of entitlement to use of land is a central issue in social organization"[457] because "[l]and rules literally set the physical platform for social and political institutions."[458] As such land "has been the subject of fierce ideological controversy."[459] Land, and its rules invoke such fervent contention because land is an essential reflection of the deep structures of thought and social meaning that construct our social world and the "'discourses' that have given rise to 'truth-effects'".[460] Ellickson, in relation to land, explains:

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[454] See *Land Sales Prohibition Act* R.S.A. 1942 c. 15; *The Communal Property Act* R.S.A. 1955, c.52. See also Canadian Human Rights Commission, "There Ought to be a Law: Alberta Restricts Land Rights" Online <http://www.chrc-ccdp.ca/en/timePortals/milestones/43mile.asp> (Date Accessed: May 29, 2004).

[455] K. Hoeppner, & J. Gill, *Communal Property in Alberta* (Edmonton: Alberta Land Use Forum, 1974) at 17.

[456] W. Blackstone, *Commentaries on the Laws of England,* Vol. 2 (Philadelphia: Rees Welsh & Co., 1898) at 471.

> *Ideology* is a fuzzy term. Most individuals have an ideology–derived from experience, philosophy, religion, or whatever–that identifies important desiderata in the organization of social life. An individual is likely to derive satisfaction) or avoid cognitive dissonance by living in a social environment that is consistent with his ideology. To be conceptually useful to a rational-actor theorist, the satisfaction of ideological rectitude must be distinguished from one's *personal* consumption of freedoms, social ties, material benefits, or other attributes of a particular social environment. Ideological satisfaction arises solely from the belief that one is associated with a group that is structured in a normatively correct way. Under this conception, a land regime's attributes of freedom, privacy, community, and equality enter into an individual's utility functions twice: first as direct arguments, and second as conditions that affect the person's sense of ideological rectitude.[461]

Land, as Singer expresses, points out that with property "what is at stake is a vision of social life."[462]

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[457] R. Ellickson, "Property in Land" (1993) 102 Yale L.J. 1315 at 1317.

[458] *Ibid* at 1344.

[459] *Ibid* at 1317.

[460] See Hawkes, *supra* note 2 at 153. A 'truth-effect' is a post-structural way to refer to things that are generally ascribed as 'true'.

[461] Ellickson, *supra* note 458 at 1345-6.

This resistance to communal landholding may not only be attributed to cultural and ideological commitments, but also can be explained through its inimical relationship with the economic and legal normative goals of efficiency and certainty which are important when land is an important commodity. Private ownership, even if the common law recognizes forms of concurrent ownership within the structure of private ownership, promotes economic efficiency. As Ellickson explains:

> in essence, the parcelization of land is a relatively low-transaction-cost method of inducing people to "do the right thing" with the earth's surface, not to mention an open-access regime, private property tends best to equate the personal product of an individual's small actions with the social product of those actions.[463]

To use the law-and-economics terminology, private property reduces externalities.

V. Conclusion

While Aboriginal law scholars such as John Borrows rightfully contributes the doctrine of *sui generis* Aboriginal title with opening the door for the potential peaceful coexistence of First Nations law with dominant Canadian legal paradigms,[464] there is a problem which becomes apparent when using a deconstructionist analysis. Indeed, the pre-existing nature of Aboriginal title is a veritable double-edged sword when approached from a deconstructionist perspective. The positive edge of the sword for Aboriginal peoples is the fact that this legal finding recognizes the potential of continued underlying Aboriginal interests in land, where these have not been extinguished. Indeed, the source and nature of Aboriginal title has even been argued to be the basis of continued Aboriginal sovereignty.[465] The Court's characterisation of Aboriginal title as a pre-existing interest however–which could be considered the other edge of the sword– is the fact that it creates a parallel system of landholding which is bound to conflict with the dominant landholding system. There may be many situations where First Nations law and dominant legal paradigms can coexist, claims to land however is not one of them. As the British Columbia Supreme Court muses in *Skeetchestn Indian Band v. British Columbia (Registrar, Kamloops Land Title District).*[466]

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[462] Singer, *supra* note 63 at 11.

[463] Ellickson, *supra* note 457 at 1327.

[464] Borrows, *supra* note 329 at 1-28.

> This case pits Aboriginal title against fee simple title. Most of the fee simple lands in this province are derived from Crown grants issued in an era when the government knew less about their obligations to aboriginals than now. Many of these lands have been developed at substantial cost to their owners. Can this be ignored? Can aboriginal rights extend to fee simple lands? Is it possible to reconcile aboriginal title and fee simple title in this late a stage?[467]

Indeed, conflicts between rights as a result of having potentially two systems of landholding are inevitable.

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[465] See K. McNeil, "Aboriginal Rights in Canada: From Title to land to Territorial Sovereignty" (1998) 5 Tulsa J. of Comparative & Int'l Law 253; See also J. Borrows, *supra* note 329.

[466] [2000]2 C.N.L.R. 330 (B.C.S.C.).

[467] *Ibid* at para 46.

In light of this inevitability, the fact that Aboriginal landholding is constructed as fundamentally different in its characterisation as inalienable and communal, may create some underlying structural problems for the success of Aboriginal interests in cases of conflict. Indeed, while the doctrine of *sui generis* Aboriginal title is often cited as a tool to "confront and overcome the biases and prejudices of the fiction of Crown tenure and the common law perspective as the exclusive sources of law, as well as to see the deep structure...of Canadian property law that constitutionally respects Aboriginal law and tenure;"[468] the above analysis suggests that there may be some problematic issues, related to the nature of Aboriginal title that may inhibit the furtherance of this goal. Thus, the response to the question of whether there was something about the law of Aboriginal title, related to the social order, that contributes to the hesitancy to reward the Chippewas' possession of the property in the *Chippewas* case seems to be yes.

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[468] Henderson, Benson & Finlay, *supra* note 228 at 398-99.

Chapter 8: Lessons from the *Chippewas of Sarnia* case

I Introduction

The ultimate ambition of this project, as outlined in the first chapter, was to explore whether there were underlying reasons, connected to the social order, which contributed to the Superior Court and the Court of Appeal's unwillingness to award the Chippewas the land in question in the *Chippewas* case. This was to be achieved through using the cultural approach to law, as described in Paul W. Kahn's *The Cultural Study of Law: Reconstructing Legal Scholarship.* While occasional references to Kahn have punctuated this thesis, the methodological rules discussed in the introduction, for example, have far from saturated my discussion of the *Chippewas* case thus far.

The explanation for this paucity is simple. Kahn's methodology, as reflected in his methodological rules and approaches, can be described not only as an analytical tool, but also as a philosophical world-view. Indeed, this entire project has been premised on this fundamental understanding of law as a social construction, and legal judgments as texts to be explored as such. As Kahn explains, "A cultural approach sees that all of law's texts are works of fiction. Each sustains an imaginative world by representing it as our world."[469] The 'thick descriptions' of the Superior Court and the Court of Appeal decisions presented in chapter two and three, respectively, reflect this approach through describing the narratives presented in the two decisions as equally valid representations of the legal event in question. Indeed, my approach to the *Chippewas* case has been an attempt to simply "achieve a re-presentation of the meanings at play in the social practice."[470] Through this approach we can begin to understand what historical, social, and cultural forces contribute to the Courts' decision in the case.

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[469] Kahn, *supra* note 14 at 126

Indeed, it was this underlying approach that made us move beyond the conclusion in chapter four that judicial discretion was the hinge upon which both legal decisions turned, to the inquiries made in later chapters. Chapter five probed whether there was something fundamental about the Courts' understanding of the Indian that contributed to the hesitancy to award the Chippewas the land. While there was a possible connection between private property holding and the perception of social responsibility, the Courts had differing perception of the Chippewas. Indeed, this suggested that there was not something fundamental about the Indian that prompted this hesitancy. Chapter six thus explored whether there was something about the land, connected to the social order that inspired this anxiety about returning the land to the Chippewas. The Superior Court, even over and above the economic value, seemed to emphasize the sentimental value of the land. The Court of Appeal, in a utilitarian manner, emphasized the need to reward people's reasonable expectations. Chapter seven explored whether there was something about the law of Aboriginal title, connected to the social order, which contributed to the Courts hesitancy to award the Chippewas the land. This inquiry resulted in the conclusions that the perception of the fundamentally alien nature of *sui generis* Aboriginal title may cause hesitancy to return currently occupied land to First nations.

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[470] *Ibid* at 39.

II. Kahn's methodological rules and the *Chippewas* case

The previous section has been a summary of the conclusions reached which were all dependent on a cultural perspective. Now, however, it is time to make explicit the lessons that can be derived from the use of Kahn's eight methodological rules discussed in the introduction.

1. The rule of law is not a failed form of something other that itself.[471]

This rule, applied to the *Chippewas* case, allows us to understand that both at the Superior Court level and the Court of Appeal level the decisions, very simply put, were intended. The decisions rendered are not imperfect, flawed or defective. Indeed, even the Supreme Court intended to signal a form of approval through refusing both an appeal and a rehearing. If we accept this, we can then also accept that the Courts' intentions were to neither entirely promote Aboriginal justice as Kent McNeil would have wanted, nor secure all land titles in Ontario as Kathleen Waters would have wanted. The real question then becomes, what are "those background structures of meaning that are always already in place and which make possible the particular regulatory schemes over which we argue."[472]

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[471] *Supra* note 28.

[472] Kahn, *supra* note 14 at 92.

In other words, the question becomes, what are the elements that make the decisions in the *Chippewas* case an acceptable and practical judgment in current social conditions?

With this principle in mind, the *Chippewas* case becomes an interesting study. This exploration of the Superior Court and the Court of Appeal judgments, rather than focussing on whether the particular Court interpreted the facts and law in the case correctly, instead focuses on the "background structures" or implied assumptions that contribute to the social construction of reality in each case. The Superior Court's understanding, for example, is predicated upon a narrative of victimization: the Court of Appeal's is predicated on a narrative of the informed consent of relatively equal parties. The point is not, however, according to this principle, to determine which interpretation is correct, but rather to acknowledge that both narratives are valid possibilities within the realm of legal possibility. As Kahn writes:

> Understanding the constructed character of the rule of law allows us to see its contingent character and to understand that law's claim upon us is not a product of law's truth but to our own imagination–our imagining its meanings and our failure to imagine alternatives. We can understand that other societies have constructed the character of the political community and the meaning of political events is fought over terms of construction. We can clarify the tensions among the possibilities that we confront and see how each makes a world for itself that cannot be subsumed within the others. Even if we try to move in one direction rather than another, we cannot resolve the tensions. There is no original foundation from which we can begin a project of free construction, unbounded by a past that establishes the conditions of our own understanding.[473]

As such, both of the decisions in the *Chippewas* case were explored not for the purpose of discovering which one was more true, but to present them as fully formed and complete products of the legal imagination.

2. The rule of law is not the product of rational design.[474]

If we accept that all of the Courts that rendered decisions in the *Chippewas* case intended the results they came to, we must then resist the urge to either criticize the decisions as irrational or conversely explain why these decisions make perfect logical sense. This is because the rule of law can not be expected to be fully and systematically rational. Indeed, as Kahn reminds us "[a]t any given moment coherence within a system of beliefs is only one among a number of competing goals or values."[475] Indeed the *Chippewas* case demonstrates very well, how the balancing of competing values contributes to a lack of coherence. We saw that both Courts try to meet the competing values of Aboriginal justice, economic efficiency, and personhood interests in the land. This is reflected in the Superior Court decision in its use of the *Sparrow* reconciliation test, the purpose of which being the balancing of the Aboriginal interests with the "interests of all Canadians."[476] In the Court of Appeal decision, it is reflected in the Court's application of the discretionary factors warranted by both public and private law. If then, the *Chippewas* case is to be criticized for its alteration of age-old property law doctrine, and its general creativity in both

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[473] *Ibid* at 39.

[474] *Supra* note 29.

[475] Kahn, *supra* note 14 at 98.

Courts' approach to the issue of remedy, it must be remembered that the Court was attempting to balance incompatible competing values. The doctrinal analysis, contained in chapter four, thus concluded that the hinge which both decisions turned upon was the concept of discretion. Indeed, both Court's rely upon their 'inherent' discretion, whether from the fusion of law and equity, the nature of public law, or the need to achieve reconciliation between Aboriginals and Canadian society, in order to achieve the final result in the case which they also perceive as fair.

3. The rule of law is a set of meanings by which we live.[477]

By accepting that the rule of law is only a set of meanings by which we live, we accept that law is not the instrument to promote any single normative goal. The rule of law is simply an "autonomous cultural form"[478] with its own internal logic, procedures and processes. In light of this rule, the examination of the *Chippewas* case in this project becomes a study in the contradictions internal to the case. As Kahn writes:

> A cultural approach rejects any such claims for endogamous legal reforms. It must reject essentialism in all its forms. Understanding law as a set of meanings by which we live, the discipline can have no normative position even with respect to apparent contradictions, let alone with respect to the relative priority of different values. Indeed, from a cultural perspective, the rule of law is largely the management of a series of tensions bordering on contradictions–e.g., reason and will, law and action, past and present,

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[476] *Chippewas* (S.C.J.), *supra* note 1 at para 753.

[477] *Supra* note 30

[478] Kahn, *supra* note 14 at 103.

sameness and difference, authority and subordination.[479]

These contradictions are indeed plentiful in the *Chippewas* case. The historical survey of Indo-European relations portrays how historical patterns in relation to Indigenous peoples are simultaneously repeated and rejected. While Courts have adopted Aboriginal justice and reconciliation as a value to be sought in decisions regarding Aboriginal rights--which incidentally is no small feat when even having a cursory glance at early decisions on Aboriginal rights in Canada--they still end up resorting to solutions that conform to historical patterns of Crown paternalism by ultimately allowing only an action of breach of fiduciary duty against the Crown In relation to this methodological rule however, it may simply be that the incidental point is truly the important one–that Aboriginal rights are now a value that the Court finds to be important. As Kahn explains

> These multiple possibilities of reformist critique fuel much of the argument and debate in legal scholarship. The particular choice of values invoked in any reform effort will always appear partial and thus arbitrary. The scholarly–and judicial–response to this conflict of reform programs often advocates "balancing." Balancing is not so much a scholarly contribution to a solution, as a recognition that the competing claim stands on equal footing.[480]

If balancing is indeed the way a Court deals with claims on equal footing, then this reflects a remarkable victory for Aboriginal rights, for this would mean that Aboriginal justice is being considered as equally important to the other normative goals.

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[479] *Ibid* at 106.

[480] *Ibid* at 105.

4. Scholarship must forsake the myth of progress.[481]

This methodological rule has a particular importance in the realm of Aboriginal peoples and the law in Canada. This rule, one will recall, reminds us "law supports multiple narrations of progress."[482] Looking forward in time, there is no ultimate goal with which the rule of law must strive towards. Looking back in time, there is no narration of linear progress which "become[s] a sort of triumphant account of law's progress."[483] Through exploring whether there is something about the Indian, connected to the social order, which contributed to the Courts' hesitancy to award the Chippewas the land in the *Chippewas* case we discovered that once the cultural and political sovereignty of First Nations peoples was compromised, the project of civilising the Indian was undertaken. This is very obviously the colonial narrative of progress from barbarism to civilization. The enactment of legislation such as the *Gradual Civilization Act* was indeed an instance of this myth of progress imposed upon Indigenous peoples. Interestingly, it was through the educative effects of private property that the Indian would become integrated into civilized, modern, society.

Neither the Superior Court nor the Court of Appeal ascribe to this particular historic version of progress in the *Chippewas* case. Both the Superior Court and the Court of Appeal instead prescribe to what I would call a narrative of historical reconciliation. This narrative draws upon the language of fairness derived from equity, and the discourse of historical reconciliation derived from the jurisprudence of s.35 of the *Constitution Act*, to move towards a different goal–"the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[484] Indeed this is a narrative of progress as well that seems to envision the end of conflict between Aboriginal rights and greater Canadian society. The interesting question truly is whether this is another unattainable, and indeed undesirable narrative of progress. It is possible that complete reconciliation of First Nations, or the end of the tension between Aboriginal cultural rights and greater Canadian society, would indeed only be possible through the complete integration of Indigenous peoples into the ways of broader Canadian society. I say this because as long as Aboriginal rights remain, they will be in competition, if not conflict, with non-Aboriginal rights. Thus maybe the goal striven for should be the creation of more effective mechanisms to deal with competing Aboriginal and non-Aboriginal interests, rather than a final and complete reconciliation.

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[481] *Supra* note 31.

[482] Kahn, *supra* note 14 at 107.

[483] *Ibid* at 106.

5. The object of the cultural study is the community, not the individual.[485]

This rule reminds us that "the rule of law exists not as an attribute of a trans-historical subject, but as a distribution of power that works to sustain the conditions of belief that are constitutive of the unity of a nation as a single community."[486] Indeed this should direct us to look at what united both parties, though adverse, under the community of the rule of law. In chapter six, we observed that there is an emotional or sentimental reason given why it is wrong to deprive someone of their property. Both Courts express that it was wrong for the Chippewas to be deprived of their land. The Superior Court and the Court of Appeal do differ on how nefarious this dispossession was as a result of their different perceptions of the Chippewas' participation in the transaction. Both Courts agree, however, that the historical dispossession of Indian land to some degree was not proper. In the Courts' perception however, it would be more reprehensible to deprive the current owners, who were not at fault for the Chippewas' dispossession. Interestingly, this sentimental rhetoric appears on both sides of the argument. Indeed the importance of land, and not only its economic value, to both the Indigenous and the non-Indigenous community, should not be understated.

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[484] *Van der Peet, supra* note 244 at para 31.

[485] *Supra* note 32.

6. Law's rule is never at stake in the outcome of the particular case.[487]

This methodological rule reminds us that civil society under the rule of law will not end as the result of any particular decision, even the *Chippewas* case. Ultimately, "[l]aw's rule is already complete before the moment of decision."[488] Indeed, while "each side in a legal controversy will claim that the law "requires" the outcome they support...such dramatic rhetoric rarely carries forward beyond the moment of decision. The legal scholar and the dissenting judge cry that the sky is falling, but it never does."[489] This realization teaches us several lessons. The *Chippewas* case, while representing a remarkable deviation from some firmly established law, is truly "just another precedent to be deployed in future cases."[490] The *Chippewas* case's importance, if we approach it with a cultural paradigm is fairly minimal. Neither this decision, nor any other, will ever threaten the strength of the rule of law. This decision will simply recede into history, despite an occasional mention in subsequent cases.

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[486] Kahn, *supra* note 14 at 113.

[487] *Supra* note 33.

[488] Kahn, *supra* note 14 at 117.

7. The cultural study of law requires the study of law's other.[491]

In chapter seven of this thesis, I developed the idea that *sui generis* Aboriginal title is *constructed* or *perceived* as different or alterior in current jurisprudence. This rule reminds us that the terms 'constructed' or 'perceived' are of great importance. This is because, according to Kahn's discussion of law's other, *sui generis* Aboriginal title is indeed not outside the realm of law, it is simply an underdeveloped legal construct. As Kahn explains:

> There are two alternative symbolic forms that actively compete with our conception of a community under law: *political action and love*. These are the forms of meaning against which law must deploy its resources. They are the "other" that we see from within the rule of law. A cultural study must examine the way in which law's rule acknowledges, co-opts, and suppresses these alternative forms of apprehending the meaning of

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[489] *Ibid.*

[490] *Ibid* at 118.

[491] *Supra* note 34.

> self, community, and history.[492]

Aboriginal title can not be said to be either of these things. It is a legal construct created by the Courts. While it is constructed and perceived as alterior, I would allege that it is not fundamentally so. Its source is not an uncommon in property law–occupation is an accepted way to acquire an interest in land.[493] Its communal nature is also not so unique, as many structures exist in the law that facilitate group control of property, such as the construct of the corporation. And its inalienability is again not without match, as there are other forms of public and private restrictions that can be placed on land to control its future uses, such as restrictive covenants or servitudes.[494] As such, despite the insistence of the Court that *sui generis* Aboriginal title is a unique concept to the common law, it seems not to be so. If, as chapter seven argued, this perception of Aboriginal title is indeed contributing to the hesitations of Courts to award Indigenous peoples occupied land it could possibly signal the need for a further, more substantive, development of the concept of *sui generis* Aboriginal title which emphasize similarities rather than differences. Fear of the unknown and unpredictable, if this occurs, may then be less of a factor.

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[492] Kahn, *supra* note 14 at 120.

[493] Ziff, *supra* note 7 at 34-36.

[494] See Canada, Environment Canada "The Ecological Gifts Program" Online <http://www.cws-scf.ec.gc.ca/ecogifts/intro_e.cfm> Date accessed: May 26, 2004 for an discussion of a government sponsored initiative to promote the creation conservation easements through offering tax incentives. See also O. Trombetti & K.W. Cox, *Land, Law and Wildlife Conservation: The Role of Conservation Easements and Covenants in Canada* (Ottawa: Wildlife Habitat Canada, 1990).

8. The rule of law makes a total claim upon the self.[495]

The final methodological rule reminds us that this exploration of the decisions in the *Chippewas* case is by no means the end of the inquiry. The decisions in the *Chippewas* case represent only one instance of the rule of law. As Kahn explains, the "judicial opinion has a special, but not exhaustive role in the study of law's rule."[496] The rule of law, however, is not solely experienced through judicial decisions, as "we experience governance and authority in multiple places."[497] As Kahn further illustrates:

> We experience the rule of law not just when the policeman stops us on the street or when we consult a lawyer on how to create a corporation. The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent.[498]

If this is so, appellate level legal decisions are only the beginning of understanding the dynamics of Indigenous land claims in Canada. We may have discovered that there is a perceived connection between private property and socialization. We may have advanced the proposition that the sentimental attachment of occupiers to their land has an even more profound significance than its economic value. We may have tendered the conclusion that the perception of *sui generis* Aboriginal title as fundamentally different or alterior may create some anxiety in the legal mind. It must be remembered however that the inquiry cannot end here, as the attempts to 'reconcile' Aboriginal landholding with the broader community does not only occur in the Courts. Indeed, some of the most interesting efforts are conducted around negotiating tables, and are potentially more influenced by media than by law.

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[495] *Supra* note 35.

[496] Kahn, *supra* note 14 at 125.

[497] *Ibid* at 124.

III. Final Recommendations?

It is at this point that a typical legal scholar outlines the three of four positive steps that must be taken to correct the currently ill-fated area of law that was arduously examined. The nature of this project prohibits making such a statement. What can be said is that a better understanding of ourselves through understanding dominant society's relationship to Aboriginal peoples, land, and law is a worthy project, even in absence of specific proposals that would allege to ultimately remedy the Indian problem. I am neither a judge, nor a lawyer. The humble aim of this project was not to pretend to be either, but present ideas that I may flatter myself to think could potentially be employed by either.

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[498] *Ibid*

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